89-1197

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF ST. GEORGE,
Petitioner,

v.

PHILLIP L. FOREMASTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January 26, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Whether two efforts by the City of St. George, Utah to promote the City's most prominent architectural structure, a Mormon temple, as a significant tourist attraction by allowing a lighting credit to the Church to keep the temple illuminated at night and by depicting the temple on the City's logo violate the Establishment Clause of the First Amendment. Specifically, the questions raised are:

1. Whether the court of appeals properly held that an electricity ratepayer has standing to challenge a rate credit offered by the City to the Mormon Church to encourage the Church to keep the temple illuminated at night.

2. Whether an individual has standing to challenge the constitutionality of a city logo, which contains, *inter alia*, a picture of a Mormon temple, based solely on the allegation that "seeing" the picture "offends" him.

3. Whether a municipality violates the Establishment Clause whenever it grants a subsidy to a religious institution that is not required by the Free Exercise Clause.

4. Whether the court of appeals erred in holding that a trial must be held to determine if the "primary effect" of a particular government practice constitutes a subjective message of endorsement of a particular religion in violation of the Establishment Clause.

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The City of St. George, Utah ("the City"), hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 882 F.2d 1485 (10th Cir. 1989). The February 24, 1987 memorandum decision and order of the district court denying plaintiffs' motion for summary judgment (App., *infra*, 17a-33a) is reported at 655 F. Supp. 844 (D. Utah 1987). The December 18, 1987 memorandum decision and order of the district court dismissing plaintiffs' claims is reported at 687 F. Supp. 548 (D. Utah 1987). The district court's December 17, 1987

findings of fact and conclusions of law relating to plaintiffs' motion for attorneys fees (App., *infra*, 41a-54a) and its January 15, 1988 order amending those findings (App., *infra*, 57a-59a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1989. Rehearing was denied on September 28, 1989. App., *infra*, 15a-16a. On December 12, 1989, Justice White extended the time for filing a petition to and including January 26, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the Constitution of the United States provides, in relevant part, that:

> The judicial power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority; —to . . . Controversies to which the United States shall be a Party . . . ."

U.S. Const. art. III, § 2, cl. 1.

The First Amendment to the Constitution of the United States provides, in relevant part, that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

U.S. Const. amend. I.

STATEMENT

1. Petitioner City of St. George, Utah is the largest city in southern Utah with a population of 11,350 in 1980. App., *infra*, 2a. The main industry in St. George

is tourism, and one of the most visible landmarks in the City is the St. George Temple of the Church of Jesus Christ of Latter-day Saints, which, in 1985, attracted over a quarter of a million visitors. App., *infra*, 2a.[1] The St. George Temple, dedicated in 1877, was the first Mormon temple completed in Utah. App. 21a.

In describing the value of the temple as an architectural attraction, the district court stated:

> The parties agree that the St. George Mormon Temple is a building "of striking and dramatic design and architecture . . . [which] is the predominant man-made structure of the entire city and area. The pure white stucco exterior of the . . . Temple makes it stand out from the surrounding natural red sand and stone of the area."

App., *infra*, 29a. It is therefore unquestioned that "[t]he temple . . . has a secular beauty and attraction apart from the building's religious significance." *Id.*

In order to highlight the temple's aesthetic values and to promote it as an historical landmark that attracts tourists, the Utility Department of the City since 1942 has issued a credit on the temple's electrical utility bill to defray partially the costs of illuminating the temple at night.[2] Before it was discontinued, the value of the credit ranged from approximately $137 to $180 per month.[3]

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[1] Members of the Church of Jesus Christ of Latter-Day Saints are commonly referred to as "Mormons." App., *infra*, 2a, n.1.

[2] The credit was set at a fixed dollar value, which amounted to about 2% of the electricity used at the temple and somewhat less than it would cost to light the exterior of the temple from about 10:00 p.m. to daylight.

[3] The decision to provide nighttime lighting for the temple was made by the City Council of St. George to promote tourism by providing illumination for the City's most prominent and visible attraction. App., *infra*, 45a. In the past, the President of the temple had concluded that there was no reason for the Church to incur

In 1974, the City directed that a draftsman be retained to create a City logo to be placed, *inter alia*, on City vehicles. The logo would serve "as a 'descriptive, colorful, attraction-getting' symbol to advertise the St. George area." App., *infra*, 19a. The logo approved by the City Council depicts several prominent characteristics of the St. George area that attract people. In general, the logo highlights the broad range of vacation opportunities offered to visitors of St. George—a setting sun, a golf course, a cluster of grapes, the motto "Where the Summer Sun Spends the Winter," a red hill emblazoned with the word "Dixie," and a sketch of the temple. See App., *infra*, 3a. Although a new logo without the temple was created in 1981, the previous logo still is displayed on a plaque in the City Hall and on two signs in the parking lot adjacent to the City Hall. App., *infra*, 19a. It is the City's intention to continue displaying the logo unless ordered to remove it by the district court.

2. On October 21, 1985, respondent Phillip Foremaster filed a complaint in the United States District Court for the District of Utah, alleging that the electricity credit

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the expense of lighting the exterior of the temple past 10:00 p.m. because temple activities ordinarily were completed by that time. The President had therefore refused to authorize this lighting at the Church's expense. In June, 1986, a change in the administration of the temple (unrelated to this case) resulted in the appointment of a new President who indicated that the credit was no longer necessary because he intended to undertake the nighttime lighting of the temple, regardless of the credit. *Id.* at 46a. The credit on the temple's lighting bill since has been discontinued. However, if the Mormon Church were to change its policy, the City has clearly indicated that it would resume the lighting credit. See Deposition of Council Member Daniel D. MacArthur at 15; Deposition of Council Member Randy Wilkinson at 32-33; Deposition of Council Member Douglas B. Nielson at 15; compare *Burlington Northern R.R. Co.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 436 n.4 (1987); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 100-101 (1983).

and logo violated the Establishment Clause of the First Amendment.[4] Respondent alleged that as a user of electricity in the City of St. George, he suffered economic harm when the Utility Department issued a credit contributing to nighttime illumination of the temple. With respect to the logo, Respondent did not allege any economic injury or any effect on his conduct or behavior. Instead, respondent claimed that the sight of the lit temple at night and the presence of the temple on the City's logo offended him. App., *infra*, 66a.

The district court dismissed respondent's claim concerning the electrical credit on the ground that he lacked standing. App., *infra*, 61a. According to the district court, respondent was a "resident of the City of St. George" at the time the complaint was filed, "but from and after [that time], plaintiff was not a ratepayer of the electrical utility operated by the defendant City of St. George." App., *infra*, 58a. Thus, respondent "was not affected financially by the electrical subsidy/credit" and therefore did not have standing to challenge the credit. App., *infra*, 52a. Respondent nevertheless sought attorneys fees, claiming that his lawsuit "caused" the City to cease providing the lighting credit to the temple. Because the court concluded that respondent lacked standing, it determined that he was not a prevailing party

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[4] Respondent's complaint, as amended, sought declaratory relief and a permanent injunction against any electrical credit for lighting of the temple and against use of the City logo, as well as costs and attorneys fees. On November 3, 1986, individual ministers representing the Washington County Ministerial Alliance filed a complaint against the City in the United States District Court for the District of Utah, alleging that the lighting and logo violated the Establishment Clause. The district court dismissed the latter complaint with prejudice in an order dated December 18, 1987. App. 55a-56a. The individual minister plaintiffs did not appeal and, accordingly, are no longer parties to this case.

under 42 U.S.C. § 1988 and, accordingly, was not entitled to attorneys fees. App., *infra*, 40a.[5]

With respect to the claim concerning the City's logo, the court noted that the respondents had "rel[ied] exclusively on the effects prong of the *Lemon* test to attack the logo of the City of St. George." App., *infra*, 28a; see *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Therefore, the "critical issue" before the district court was "whether the City's logo . . . has the primary effect of conveying to th[e] average observer that the City is endorsing or advertising a particular religion." *Id.* The court concluded that, viewing the logo as a whole (App., *infra*, 29a, 32a), the sketch of the temple fits within the clear secular "message of the logo" that "these are the things to do and places to see in the City of St. George." *Id.* at 29a. Thus, despite the fact that Mormon temples have religious significance, the court concluded that the primary effect of depiction of the temple on the logo was not the endorsement of religion. *Id.* at 31a (citing *Lynch* v. *Donnelly*, 465 U.S. 668 (1984)). Accordingly, judgment was entered for petitioner. App., *infra*, 40a.

3. A panel of the Tenth Circuit reversed. With respect to respondent's standing to challenge the credit for purposes of lighting the temple, the court stated:

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[5] A plaintiff may be determined to be a "prevailing party" for purposes of Section 1988 even in the absence of a favorable judgment on the merits of his claims. App., *infra*, 6a. In order to obtain attorneys fees absent a determination on the merits, a plaintiff in the Tenth Circuit must satisfy the "catalyst" test and show (1) that the lawsuit is causally linked to the relief obtained by way of the defendant's subsequent conduct or "response," and (2) that the defendant's "response" was "required by law." See *id.* at 6a-7a. The latter standard requires that "[respondent] show that he *would have prevailed* on the merits." *Id.* at 7a (emphasis added). The district court held that because "[respondent] was found to lack standing he may not 'prevail' under the catalyst test." App., *infra*, 38a.

> To the extent that this [credit on the temple's electric bill] diminished total revenues for the City's Utility Department, the Utility Department and the purchasers of municipal electricity are less well off and those purchasers *may very well pay higher rates.*

App., *infra*, 5a (emphasis added and footnote omitted). The Court reasoned that some portion of respondent's fixed rent may have been used to pay electric utility bills, and, accordingly respondent could be considered a "purchaser" of electric power (*id.*) whose "injury can be traced to the [credit]." *Id.* The court asserted that because "[a]n injunction to stay payment of the City's subsidy would have redressed [respondent's] injury" (*id.* at 6a), respondent had standing to challenge the electrical credit.

On the merits, the court announced that any "governmental subsidy directed at religious institutions and *not required by the Free Exercise Clause* conveys a message of endorsement." App., *infra*, 8a (emphasis added) (citing *Texas Monthly, Inc.* v. *Bullock*, 109 S.Ct. 890, 899-900 (1989)). The court reasoned that the lighting credit obviously was not required by the Free Exercise Clause, and, as a result, the credit constituted an impermissible "endorsement" of the Mormon religion. The court concluded that the subsidy violated the principle of "complete government neutrality toward religion," and therefore the City's decision to terminate the credit "was required by law." App. 6a-7a (quoting *J & J Anderson Inc.* v. *Town of Erie*, 767 F.2d 1469, 1473 (10th Cir. 1985)).

With respect to the claim regarding the City logo, the Tenth Circuit also found that respondent possessed standing to challenge the logo. The court began its analysis by noting that this Court's decision in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982), required plaintiffs to "identify a[] personal injury suffered by them *as a consequence* of the alleged constitutional error, other

than the psychological consequences presumably produced by observation of conduct with which one disagrees." App., *infra*, 9a. According to the Tenth Circuit, "[t]he circuit courts have interpreted *Valley Forge* in different ways." *Id.* at 10a. "The Seventh Circuit requires that a plaintiff allege that a municipality's action offends him and that he has *altered his behavior as a consequence of it*." *Id.* (emphasis added) (citing *Freedom From Religion Found.* v. *Zielke*, 845 F.2d 1463 (7th Cir. 1988)). The Tenth Circuit noted that the Sixth and Eleventh Circuits, by contrast, require only that the plaintiff claim that he had "contact" with the allegedly offensive conduct. *Id.* (citing *Saladin* v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *Hawley* v. *City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). The Tenth Circuit specifically rejected the Seventh Circuit's reading of *Valley Forge* in favor of the more "persuasive" reasoning of the Sixth Circuit. App., *infra*, 10a.

Applying the Sixth Circuit "contact test," the court noted that respondent "claimed that 'the visual impact of seeing that temple on a daily basis as part of an official emblem . . . has and continues to greatly offend, intimidate and affect me.'" *Id.* at 11a. Thus, the court found that "[respondent's] allegation of direct, personal contact suffices as non-economic injury" under *Valley Forge*. *Id.*

On the merits of the City logo issue, the court reversed the entry of summary judgment for petitioner on the question whether the logo constitutes an establishment of religion. The court held that the "effects prong" of the *Lemon* test requires a trial as to "what an average observer would perceive when viewing the action of the City [in using the sketch of the temple as part of the logo]." *Id.* at 12a. The court found that the record before the district court presented a "genuine issue of material fact as to whether the depiction of the temple in the context of the official St. George logo conveys pri-

marily a message of governmental endorsement and advancement of the Mormon religion." *Id.* at 14a. Accordingly, the court of appeals remanded for trial on the issue of the logo's primary effect.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided four distinct questions of federal law concerning the requirement of standing under Article III of the Constitution and the scope of the Establishment Clause of the First Amendment. With respect to the court's holdings on the standing issues, the court's decision that respondent possessed standing to challenge the City's logo gives rise to an acknowledged conflict with the Seventh Circuit. The Court's holding on respondent's standing to challenge the electricity credit reflects a view of the required nexus between the alleged injury and the challenged conduct that improperly expands Article III limits on the jurisdiction of federal courts in a manner inconsistent with the decisions of this Court.

The court's decisions on the merits of respondent's Establishment Clause claims also raise issues worthy of review by this Court. The ruling that any "subsidy . . . not required by the Free Exercise Clause" comprises an unconstitutional "endorsement" of religion obviously restricts significantly governmental freedom to promote secular purposes in ways that incidentally benefit religion. Specifically, the ruling directly impairs the government's freedom to support and preserve historic religious landmarks for aesthetic and other, purely secular reasons. That holding also raises an important issue unresolved by this Court concerning the tension between the Establishment Clause and Free Exercise Clause which warrants review by this Court. Second, the additional ruling of the Tenth Circuit—that the question of whether the logo conveys a subjective message of endorsement in violation of the Establishment Clause is a question of "fact" that

requires a trial—also raises an important issue of federal law never decided by this Court. Review of the decision below therefore is plainly warranted.

1. As the Tenth Circuit acknowledged, its decision that respondent's "contact" with the City's logo was sufficient to give respondent standing to challenge the constitutionality of the logo directly and expressly rejected the Seventh Circuit's interpretation of this Court's decision in *Valley Forge*. Accordingly, that holding presents this Court with a conflict in the circuits on an important issue of standing doctrine.

In *Valley Forge* this Court held that plaintiffs, a nonprofit association and certain individual members who resided in Maryland and Virginia, lacked standing to object to the conveyance of surplus government property in Pennsylvania by the federal government to the Valley Forge Christian College. According to the Court, the plaintiffs could not assert a case or controversy under the Establishment Clause because they "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485 (emphasis in original).[6]

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[6] *Valley Forge* reaffirmed the basic requirements of constitutional standing—*i.e.*, that a plaintiff must "show that he personally has suffered some actual or threatened injury," which is "distinct and palpable." 454 U.S. at 472 (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99, 100 (1979)); see *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225-226 (1974) (Article III mandates a showing that plaintiff "possess[es] the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct") (quoting *Doremus* v. *Board of Educ.*, 342 U.S. 429, 435 (1952)). The requirement of actual or threatened injury furthers one of the major purposes of the case or controversy requirement, which is to assure "concrete adverseness which sharpens the presentation of issues." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

In reversing the court of appeals' grant of standing, the Court held that the "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III . . . ." 454 U.S. at 483. Thus, while the plaintiffs were "firmly committed to the constitutional principle of separation of church and State," such an "interest" was not enough to confer standing because plaintiffs' had not suffered "an *injury* of *any* kind, economic or otherwise, sufficient to confer standing." *Id.* at 486 (emphasis in original).

Given the court's interpretation of the requirements of Article III in *Valley Forge*, several courts of appeals have endeavored to define precisely what constitutes the minimum non-economic injury arising from violation of the Establishment Clause that is sufficient to confer standing. The Seventh Circuit has interpreted and applied *Valley Forge* to require plaintiffs to establish more than simple "contact" with "offensive" governmental conduct in order to challenge that conduct under the Establishment Clause in federal court. Under the Seventh Circuit's standing analysis, a plaintiff must establish that he has altered his own conduct or behavior as a consequence of the challenged governmental action. *Freedom From Religion Found.* v. *Zielke*, 845 F.2d 1463, 1468 (7th Cir. 1988); *ACLU* v. *City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) (averment that plaintiffs altered their normal travel routes to avoid viewing a lighted cross displayed on public property sufficient to confer standing).

The Seventh Circuit explained in *Zielke* that neither a "spiritual stake" in the controversy nor a deep commitment to the principle of separation of church and state suffices to confer standing in federal court to bring an Establishment Clause challenge to governmental conduct, unless there is some concrete effect on the plaintiff

arising from the challenged conduct. 845 F.2d at 1468 and n.3. Moreover, according to the court, "[t]he psychological harm that results from witnessing conduct with which one disagrees [also] is not sufficient to confer standing on a litigant." *Id.* at 1467.

The Sixth and Eleventh Circuits have reached the opposite conclusion. For example, the Eleventh Circuit, in *Saladin* v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987), held that the plaintiffs possessed standing where they alleged that the City seal "denigrated their personal and philosophical beliefs and made them feel like second class citizens." *Id.* at 689. According to the Eleventh Circuit, "a non-economic injury which results from a party's being subjected to unwelcome religious statements can support a standing claim, so long as the parties are 'directly affected by the laws and practices against whom their complaints are directed.'" *Saladin*, 812 F.2d at 692 (quoting *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203 (1963)). Because the plaintiffs had "come into direct contact with the offensive conduct," the court ruled that the plaintiffs had demonstrated standing to challenge the content of the seal.

In *ACLU* v. *Rabun County*, 698 F.2d 1098 (11th Cir. 1983), the Eleventh Circuit held that the plaintiffs had standing to challenge the presence of a religious symbol (a lit Latin cross) in a public park where plaintiffs alleged that their enjoyment of the park had been "conditioned upon the acceptance of unwanted religious symbolism." *Rabun County*, 698 F.2d at 1106-1108. The Eleventh Circuit held that, unlike the plaintiffs in *Valley Forge*, the plaintiffs in *Rabun County* had presented "evidence of the physical and metaphysical impact of the cross" (*id.* at 1108). Because plaintiffs demonstrated that they had used the park in the past and intended to do so in future, the court held that they "ha[d] little

choice but to continually view the cross and suffer from the spiritual harm to which [they] testified." *Id.*[7]

The court of appeals in this case recognized that the decisions of the Sixth and Eleventh Circuits in *Saladin* and *Rabun County*—which "find standing based on an allegation of direct personal contact with the offensive action alone"—conflicted with the Seventh Circuit's requirement that plaintiff demonstrate that he "has altered his behavior as a consequence" of the offensive contact. 882 F.2d at 1490; App. 10a. Rejecting the Seventh Circuit's more stringent standing requirement in favor of that applied by the other circuits, the Tenth Circuit held that "direct, personal contact with offensive municipal conduct satisfied *Valley Forge*." 882 F.2d at 1490-1491, App. 11a. Applying that standard to this case, the court decided that respondent's "contact" with the logo that allegedly offended and intimidated him satisfied Article III —even though respondent did not allege that he had in any way altered or changed his behavior in response to the allegedly offensive conduct.

The Tenth Circuit's ruling that direct contact with offensive governmental action—without any showing of impairment of plaintiff's interest or effect on plaintiff's conduct—is sufficient to establish standing not only conflicts with the Seventh Circuit's decisions, but it also presents an important question concerning the Article III limits on federal court jurisdiction. It is well settled that "an asserted right to have the Government act in ac-

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[7] Similarly, in *Hawley* v. *City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986), the Sixth Circuit concluded that plaintiffs had standing to challenge the "leasing of space in an airport to a church for use as a chapel" (*id.* at 737) where the plaintiffs had offered the conclusory allegation that they "regularly use" the airport and that the "presence of a sectarian chapel . . . impairs [their] use" of the airport. The court reasoned that "[e]ven if [plaintiffs] can avoid" the offensive contact with the chapel, "this impingement on their right to use the airport is sufficient to confer standing . . . ." *Hawley*, 773 F.2d at 740.

cordance with the law is not sufficient, standing alone, to confer jurisdiction on a federal court," *Allen* v. *Wright*, 468 U.S. 737, 754 (1984) and this Court should now determine whether the allegation of direct "contact" with the allegedly unlawful conduct is a sufficient interest to confer jurisdiction to challenge government conduct in federal court.

2. In order to demonstrate standing, a plaintiff must show not only an "actual or threatened injury" but also that the injury "fairly can be traced to the challenged action," and is "likely to be redressed by a favorable decision." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). In *Simon*, this Court denied standing where it was "purely speculative" whether the alleged injury—a denial of hospital service—fairly could be traced to the challenged tax ruling by the Secretary of Treasury. 426 U.S. at 42-43. Standing also was denied because it was "equally speculative whether the desired exercise of the court's remedial powers" to overturn the challenged ruling would result in the provision of hospital services to the plaintiffs. Thus, failure to establish a *demonstrated* nexus between the injury and the unlawful conduct *and* between the injury and the remedy sought deprives a plaintiff of standing. *Id.*[8]

The Tenth Circuit's holding with respect to respondent's standing to challenge the lighting credit presents an important application of the "fairly traceable" connection and "likely redressability" requirements established in the prior decisions of this Court. In this case, the Tenth Circuit held that respondent was a "purchaser" of electricity and that, because of the credit to

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[8] See also *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977) ("complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions"); *Warth* v. *Seldin*, 422 U.S. 490, 507 (1975); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973) (requiring a " 'direct' relationship between the alleged injury and the claim sought to be adjudicated").

the temple, "purchasers may very well pay higher rates." 882 F.2d at 1487; App. 5a (footnote omitted). Respondent, however, offered no evidence that the credit affected him financially; instead, the Tenth Circuit simply assumed that "[h]ad the City collected the cost of free electricity provided to the temple, the revenues of the Utility would have been enhanced, eliminating the need for purchasers of electricity, including [respondent], to pay for the amount used by the temple." 882 F.2d at 1488; App. 6a.[9] In addition, the court below simply asserted that an "injunction to stay payment of the City's subsidy would have redressed [respondent's] injury." *Id.*

Accordingly, respondent did not (and could not) demonstrate that the electric credit to the temple fairly could be traced to the rate paid by purchasers of electricity from St. George's Utility Department. Because he had not established the requisite nexus between the alleged economic harm (higher electricity rates) and the unlawful conduct (a partial credit for one customer), respondent also could not show that there was a "substantial likelihood" that his requested injunction to stop the credit would redress his economic injury. See *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 75 n. 20 (1978).[10]

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[9] In fact, respondent was not affected by the $180 credit on the temple's electricity bill. The electricity rates of the municipal utility are established on a standard ratemaking formula: rates are set based upon the cost of producing electricity (expense) plus a desired rate of return (profit). The credit is treated as a donation, which is credited to profits, not expenses. Thus, the credit does not increase the cost of production and thereby increase the rates paid by purchasers of electricity. Instead, it reduces the return to the shareholder, the City.

[10] See *Allen* v. *Wright*, 468 U.S. at 759 n.24 (when "[t]he relief requested by the plaintiff[] [is] simply the cessation of the allegedly illegal conduct . . . , the 'redressability' analysis is identical to the 'fairly traceable' analysis."). Because utility rates are determined

In determining the existence of Article III standing in cases in which the plaintiffs were ratepayers, two other courts of appeals have held that such ratepayers lacked standing. One court has interpreted *Valley Forge* to reject the argument that ratepayer status alone is sufficient to demonstate standing in federal court. *Citizens For An Orderly Energy Policy* v. *Suffolk County*, 813 F.2d 570 (2d Cir. 1987) (per curiam), *aff'g* 604 F. Supp. 1084, 1091 (E.D.N.Y.). Because ratepayer status is no different from taxpayer status in the standing analysis, "conferring standing on any person who is a [] ratepayer would permit judicial actions by millions of persons with only the most 'generalized grievance.'" 604 F. Supp. at 1091 (quoting *Valley Forge*, 454 U.S. at 470, 478-79). Similarly, in considering whether ratepayers had standing to challenge disbursal of federal funds to a utility, the Eleventh Circuit required the ratepayers to allege "injury in fact" that is "likely to be redressed by the requested relief." *Marshall Durbin Co.* v. *U.S. Environ. Prot. Agency*, 788 F.2d 1490, 1492 (11th Cir. 1986) (citing *Association of Data Processing Service Orgs. Inc.* v. *Camp*, 397 U.S. 150 (1970); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)). The ratepayers in *Marshall Durbin*, according to the Eleventh Circuit, lacked standing because there was a "missing link" in the allegations; even if the relief requested —the barring of federal funds—were granted, the utiilty might still expand the plant and rates would thereby increase. *Id.* The Tenth Circuit's decision that respondent had standing as a ratepayer to challenge the city utility's conduct is inconsistent with these Second and Eleventh Circuit decisions.

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independently from donations such as the credit issued to the temple, an order requiring a utility to cease issuing the credit would have no effect on the rate paid by purchasers of electric power.

The Tenth Circuit's creation of "ratepayer" standing simply ignores the need for a factual "nexus between the status asserted by the litigant and the claim he presents" which this Court has required in the analogous context of "taxpayer" standing. See *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968). In fact, the rule of ratepayer standing established in the decision below does exactly what the Court in *Flast* cautioned against and creates a rule of standing "in the abstract." Indeed, the court's reliance on what "may well have" happened is wholly inconsistent with this Court's requirement that the basis of standing "be something more than an ingenious academic exercise in the conceivable . . . [and that] the allegations must be true and capable of proof at trial." *United States* v. *SCRAP*, 412 U.S. 669, 688-689 (1973).

Moreover, what makes the decision below concerning ratepayer standing important is that it opens up governmentally owned utilities to a host of potential lawsuits in federal court for every action taken that involves financing. If the claim here is sufficient to confer standing, then it follows that every claim arising under federal law that could conceivably affect the rate base of a public utility will create a federal case. This expansion of the types of cases that federal courts will be obliged to hear should only be countenanced if it is clear that the principles underlying the standing doctrine established by this Court have been fully satisfied. Because the analysis of the court of appeals is completely faithless to those principles, the Court should grant the petition to review this issue.

3. The court of appeals' holding that a "subsidy . . . not required by the Free Exercise Clause conveys a message of endorsement," in violation of the Establishment Clause, 882 F.2d at 1489; App. 8a, is an extraordinary holding that raises a serious issue about the scope of the Establishment Clause. In so holding, the Tenth Circuit concluded that the City's practice had to be struck down

under this Court's recent decision in *Texas Monthly, Inc.* v. *Bullock*, 109 S.Ct. 890 (1989). In *Texas Monthly*, this Court found a violation of the Establishment Clause where the state provided a sales tax exemption "exclusively [for] publications advancing the tenets of a religious faith." Because the exemption "lack[ed] a secular objective . . . and because it effectively endors[ed] religious beliefs," the tax exemption was deemed to violate the Establishment Clause.

Prior rulings of this Court, however, had recognized that not every law that benefits a religious institution constitutes an endorsement of religion. See *School Dist. of City of Grand Rapids* v. *Ball*, 473 U.S. 373, 393-394 (1985); *Mueller* v. *Allen*, 463 U.S. 388, 393 (1983); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 771 (1973).[11] In fact, the Court in *Texas Monthly* "in no way suggest[ed] that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." 109 S.Ct. at 901 n.8 (original emphasis). Thus, the holding below poses starkly the issue of precisely what is the relationship between *Texas Monthly* and prior decisions of this Court that had upheld subsidies to religion under the standards of *Lemon* v.

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[11] The Tenth Circuit's "all or nothing" approach to the Establishment Clause analysis fails to allow for consideration of whether the credit had the effect of endorsement in this particular *context*. See *County of Allegheny* v. *ACLU*, 109 S.Ct. 3086, 3103 (1989) (whether conduct has the effect of endorsing religion depends upon the context); *Lynch* v. *Donnelly*, 465 U.S. 668, 679 (1984) ("focus of our inquiry must be on the crèche in the context of the Christmas season"). The Tenth Circuit also did not consider the relevant factor whether "the city has reasonable alternatives" that would support its secular purposes but that would be "less religious in nature." *County of Allegheny*, 109 S.Ct. at 3114 (no inference of endorsement because city lacked "a more secular alternative symbol" to represent Chanukah).

Kurtzman, 403 U.S. 602 (1972).[12] Indeed, as a practical matter, the court's interpretation of the limits of the Establishment Clause eviscerates the "primary effect" test in *Lemon* for all cases involving a subsidy to a religious organization.

Furthermore, the Tenth Circuit's rule will have the practical effect of precluding a city or state from pursuing the legitimate and secular goal of promoting tourism or aesthetic values merely because the object of promotion (the temple in this case) has religious significance. Many of the most important historical sites and buildings in this country (*e.g.*, urban cathedrals, churches, monuments) have some religious significance. The Tenth Circuit's per se rule which prohibits state "support" for these historic and institutional landmarks presents an important issue which is worthy of review by this Court.

4. Finally, the Court also should review the Tenth Circuit's holding that the application of the "primary effect" prong of the *Lemon* test gives rise to a question of fact concerning how the average observer would perceive the City's action, which must be resolved at trial.

The Circuits which have considered whether the application of the *Lemon* test is a question of law or fact, including the Seventh, Eighth and Ninth Circuits, have decided that this issue is a question of law subject to *de novo* review on appeal. According to the Seventh Circuit, disputes as to whether a crèche has the effect of endorsing religion "involve conclusions of law rather than facts."

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[12] Moreover, the decision below is inconsistent with prior decisions of this Court that have upheld "accommodations"—in effect "subsidies"—of religious interests even though those accommodations were not mandated by the Free Exercise Clause. See, *e.g.*, *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 337 (1987); *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970) ("limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause"); *Zorach* v. *Clauson*, 343 U.S. 306 (1952).

American Jewish Congress v. *City of Chicago*, 827 F.2d 120, 123 (7th Cir. 1987); see also *id.* at 129-30 (Easterbrook, J., dissenting) (issues in Establishment Clause cases are "constitutional facts, on which findings in trial courts are neither necessary nor welcome"); *Mather* v. *Village of Mundelein*, 864 F.2d 1291, 1292 (7th Cir. 1989) (because decision whether conduct violates the Establishment Clause is a question of law, an appellate court "owe[s] no deference to the district court's resolution"). The Eighth Circuit also has decided that conclusions from the application of the *Lemon* test are "question[s] of . . . law." *Carter* v. *Broadlawns Medical Center*, 857 F.2d 448, 453 (8th Cir. 1988), *cert. denied*, 109 S.Ct. 1569 (1989); see also *Clayton by Clayton* v. *Place*, 884 F.2d 376, 378 (8th Cir. 1989) (whether a regulation is invalid under the *Lemon* test is a mixed question of law and fact subject to *de novo* review). Although the Ninth Circuit has not discussed in detail the standard of review in the context of the Establishment Clause, it has decided that appeals of such issues are "questions of law which are reviewed *de novo*" like factual questions in Fourth Amendment search and seizure disputes. *Garnett* v. *Renton School Dist. No. 403*, 874 F.2d 608, 610 (9th Cir. 1989) (citing *United States* v. *McConney*, 728 F.2d 1195 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984)).

Although no decision of this Court has directly addressed the question, there are suggestions in the various opinions of the Court, and the opinions of individual members of the Court, which suggest that whether a particular action has the effect of advancing or endorsing religion is a *question of law* and, therefore, not an appropriate one for trial. For example, Justice O'Connor, concurring in *Lynch* v. *Donnelly*, stated that:

> whether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communi-

> cate an invidious message, in large part a *legal question* to be answered on the basis of *judicial* interpretation of social facts.

465 U.S. at 693-694 (O'Connor, J., concurring) (emphasis added). In undertaking this interpretation, a court must examine "both the subjective and the objective components of the message communicated by a government action." *Id.* at 690. See also *id.* at 678-679 (Burger, C.J.) (discussing nature of the *court's* inquiry in determining whether conduct violates the Establishment Clause); *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring).

The Court recently relied upon Justice O'Connor's concurrence in *Lynch* in describing the judicial inquiry undertaken in a "primary effects" analysis, including a "review of the factual record concerning a religious object." *County of Allegheny* v. *ACLU*, 109 S.Ct. 3086, 3112 n.60 (1989) (quoting *Lynch*, *supra* at 693-694 (O'Connor, J., concurring)). In both *Lynch* and *County of Allegheny*, the Court examined the effect of the religious symbols in the context of the challenged display in determining whether the display violated the Establishment Clause. Although that inquiry involves the "inevitably fact specific . . . question" of analyzing the primary effect of the government action *in context*, the Court has never suggested that the determination of the "primary effect" of government conduct is necessarily a question of fact—either for the court or for a jury. *County of Allegheny*, 109 S.Ct. at 3108 (primary effects test involves question "whether a particular governmental practice signals the government's unconstitutional preference for a specific religious faith"). See *Edwards* v. *Aguillard*, 482 U.S. 578, 596 n.20 (1987) ("[n]umerous other Establishment Clause cases that found state statutes to be unconstitutional have been disposed of without trial") (citing *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Lemon* v. *Kurtzman*, *supra*; *Engel* v. *Vitale*, 370 U.S. 421 (1962)).

At bottom, the Tenth Circuit's remand for a trial on the effects prong of *Lemon* appears to misapprehend the fundamental nature of the appropriate inquiry into the context-specific but predominantly legal issue decided by the district court. Moreover, adoption of the Tenth Circuit's rule would in any case where a plaintiff requests even nominal damages require that a jury, as fact-finder, decide whether governmental conduct impermissibly endorses religion. The sensitive relationship between church and state embodied in the issue of governmental endorsement of religion simply cannot be left to the personal prejudices or passions of jurors. The issue transcends adjudicative factfinding and must be decided as an issue of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 26, 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-1235

PHILLIP L. FOREMASTER,
Plaintiff-Appellant,

v.

CITY OF ST. GEORGE, a political subdivision of the State of Utah,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Utah
(D.C. No. 85-1181)

Brian M. Barnard, Salt Lake City, Utah; R. Clayton Huntsman, St. George, Utah; C. Dane Nolan, Utah Legal Clinic Foundation, Salt Lake City, Utah, for Plaintiff-Appellant.

T.W. Shumway, St. George City Attorney, St. George, Utah; Steven E. Snow, Snow, Nuffer, Engstrom & Drake, St. George, Utah; James E. Mitchem, Mitchem & Mitchem, Denver, Colorado, for Defendant-Appellee.

Before HOLLOWAY, Chief Judge, WRIGHT * and BALDOCK, Circuit Judges.

WRIGHT, Circuit Judge.

We consider here the legality of a subsidy given by a municipal utility to a Mormon temple and the legality of a city's use of a logo depicting the Mormon temple.

BACKGROUND

With a population of 11,350 in 1980, St. George is the largest city in southern Utah. Local tradition holds that Brigham Young dedicated the spot where the St. George Temple of the Church of Latter Day Saints now stands.[1] This was the first Mormon temple completed in the West. Its lightened sandstone color and interesting architecture add a "striking feature" to the landscape. James E. Talmage. *The House of The Lord* (1976) at 179. A visitors center is located on the public grounds surrounding the Temple. 263,291 persons toured the center in 1985.

Since 1942, the Utility Department of the city has helped defray the cost of exterior lighting of the Temple. Each month the City issued a credit on the temple's electric bill, in effect paying for its late night illumination. In later years this credit was approximately $180 per month.

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* Honorable Eugene A. Wright, United States Senior Judge for the Ninth Circuit, sitting by designation.

[1] Members of the Church of Jesus Christ of Latter-Day Saints are commonly referred to as "Mormons" or members of the "LDS" faith.

The City also has used an official logo depicting the temple. The upper half contains a setting sun, a cluster of grapes and the motto "Where the Summer Sun Spends the Winter." The lower half contains a hill with the word "Dixie", a golf course and a sketch of the temple. (See Appendix). The City displays the logo on a plaque in the main foyer of City Hall, on two directional signs near the public parking lot of the building, and on about 85 or two-thirds of its vehicles.

In October 1985, Foremaster brought this action alleging that the subsidy and logo violated the Establishment Clause of the First Amendment. To reduce tension in the community, the City Council terminated the electric subsidy in November 1986. Finding that he lacked standing, the district court dismissed the portion of Foremaster's complaint that addressed the subsidy.[2] It also denied his motion for attorneys fees. *Foremaster v. City of St. George*, 687 F. Supp. 548, 551-52 (D. Utah 1987).

In February 1987, the court denied his motion for summary judgment on the logo issue. *Foremaster v. City of St. George*, 655 F. Supp. 844, 852 (D. Utah 1987). In December, it dismissed his complaint on the use of the logo, finding that it did not violate the Establishment Clause. 681 F. Supp. at 549.

Foremaster appeals the court's ruling that he lacked standing to challenge the electric subsidy and the denial of his request for attorneys fees. He also appeals the court's finding that the use of the logo does not violate the Establishment Clause. We have jurisdiction under 28 U.S.C. § 1291.

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[2] The court consolidated Foremaster's complaint with a suit brought by an alliance of non-Mormon ministers. It dismissed the alliance's complaint on mootness grounds, finding that it was filed after the City terminated the subsidy. The alliance did not appeal.

ANALYSIS

I. Electric Subsidy

We decide first whether the plaintiff Phillip Foremaster had standing to challenge the subsidy and, if so whether he prevailed for purposes of attorneys fees under 42 U.S.C. § 1988.

A. Standing.

Article III requires that a litigant have standing to bring a federal claim. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). At a minimum, a plaintiff must establish a personal stake in the outcome sufficient to assure the "concrete adverseness" of the issue. *Baker v. Carr*, 359 U.S. 186, 204 (1961).

To demonstrate standing, a plaintiff must allege actual or threatened personal injury, fairly traceable to the defendant's unlawful conduct and likely to be redressed by a favorable decision of the court. *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge*, 454 U.S. at 472; *Bell v. Little Axe Ind. School Dist. No. 70*, 766 F.2d 1391, 1398 (10th Cir. 1985).

In addition to the Article III requirements, the Court demands that the plaintiff assert his own rights, not those of a third party; his claims not be a "generalized grievance more appropriately addressed in the respresentative branch"; and his complaint fall within the zone of protection intended by the law. *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 474-75.

The alleged injury must be an "injury in fact, economic or otherwise." *Assoc. of Data Processing Service Org. Inc. v. Camp*, 397 U.S. 150, 152 (1969). It must be "distinct and palpable," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1978) (citing *March v. Seldin*, 422 U.S. 490, 501 (1975)), and "real and im-

mediate," not abstract, conjectural or hypothetical. *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

Foremaster alleged that he suffered economic injury because the subsidy caused him to pay higher rates for electricity. The district court found that because he did not have an electric utility account with the City he could not have suffered economic harm. We disagree.

He suffered a "distinct and palpable" injury. Revenue from the sale of electricity helped subsidize the lighting of the Mormon temple. To the extent that this subsidy diminished total revenues for the City's Utility Department, the Utility Department and the purchasers of municipal electricity are less well off and those purchasers may very well pay higher rates.[3]

Foremaster bought electric power. For over two years before April 1985, he maintained an electric utility account with the City. From April 1985 to June 1986, he lived in a mobile home in the City and paid a monthly rental fee that included electricity. He then lived in an apartment until August 1987, paying his roommate half of the electric bill. He also leased office space for his law practice which included payments for electricity. *Cf. Singleton v. Wulff*, 428 U.S. 106, 113 (1975) (physicians have standing to challenge constitutionality of abortion regulations because regulations had an economic impact on their practice). Foremaster suffered an economic injury.

The alleged injury must also be fairly traceable to the challenged action, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1975); *Warth v. Seldin*, 422 U.S. at 499; that is, standing requires a showing of causation. *Allen*, 468 U.S. at 752. Foremaster's injury can be traced to the subsidy. Had the City collected the

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[3] The Utility Department relies solely on revenues from the sale of power and receives no supplement from the City's tax revenues. The City Council controls the Department, however.

cost of free electricity provided to the temple, the revenues of the Utility would have been enhanced, eliminating the need for purchasers of electricity, including Foremaster, to pay for the amount used by the temple.

Standing requires that a favorable court ruling would likely result in actual relief from the injury. *Allen*, 468 U.S. at 751, 753 n.19; *Simon*, 426 U.S. at 38, 41. An injunction to stay payment of the City's subsidy would have redressed Foremaster's injury.

We conclude that he suffered economic harm from the City's electric subsidy to the temple and had standing to challenge it.[4]

B. Attorneys Fees

Forty-two U.S.C. § 1988 provides attorneys fees to a "prevailing party." Even though there was no final judicial determination, Foremaster requested fees because the City terminated the subsidy. The district court found incorrectly that he did not prevail because he lacked standing.

A plaintiff may prevail in the absence of a judicial determination on the merits. *Maher v. Gagne*, 448 U.S. 122, 129 (1979). In such circumstances, we have adopted the catalyst test to determine prevailing party status for attorneys fees. A plaintiff must show "(1) that [the] lawsuit is causally linked to securing the relief obtained, and (2) that the defendant's conduct in response to the lawsuit was required by law." *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1473 (10th Cir. 1985) (citing *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978)); *Luethje v. Peavine School Dist. of Adair County*, 872 F.2d 352, 354 (10th Cir. 1989).

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[4] Because we find standing due to direct economic injury we need not address Foremaster's arguments for standing based on taxpayer status and non-economic injury.

The lawsuit need not have been the sole reason for prompting the City to terminate the electric subsidy but must have been a "substantial factor or a significant catalyst." *Supre v. Ricketts*, 792 F.2d 958, 962 (10th Cir. 1986); *Luethje*, 872 F.2d at 354 (defendant's change in policy was "to quell the disharmony caused by plaintiff's complaints"). The district court found specifically that the City Council terminated the subsidy to reduce tension in the community and to save time and expense of litigating Foremaster's lawsuit. The finding was not clearly erroneous.

The catalyst test also requires that Foremaster show that he would have prevailed on the merits. He alleged that the electric subsidy violated the Establishment Clause. We review *de novo* the legal basis for terminating the subsidy. *See Ricketts*, 792 F.2d at 961.

The Establishment Clause mandates complete government neutrality toward religion. *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). It proscribes "sponsorship, financial support, and active involvement of the sovereign in religious activity." *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 381 (1985) (citing *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973)); *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1946) (no state "can pass laws which aid one religion, aid all religions or prefer one religion over another").

Constitutional scrutiny requires that we apply the three-part test first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The government's action is permissible only if it meets three conditions: (1) it must have a secular purpose; (2) its primary effect must be one that "neither advances nor inhibits" religion; and (3) it must not foster an excessive governmental entanglement with religion. *Id.*; *Bell*, 766 F.2d at 1402; *Friedman v. Bd. of County Comm'rs of Bernallilo County*,

781 F.2d 777, 780 (10th Cir.) (en banc), *cert. denied*, 476 U.S. 1169 (1985).

We need not consider the first and third parts of the *Lemon* test because the electric subsidy fails the second requirement. In *Grand Rapids*, the Supreme Court held that a school district's program to supplement teaching in non-public schools impermissibly subsidized religious institutions. 473 U.S. at 392. A governmental subsidy directed at religious institutions and not required by the Free Exercise Clause conveys a message of endorsement. *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 899-900 (1989) (Brennan, J.) (state sales tax exemption for periodicals published or distributed by a religious faith violates Establishment Clause). *Cf. Bowen v. Kendrick*, 108 S. Ct. 2562, 2577, (1988) (statute authorizing government subsidy to religious organizations for *non-religious* social services does not violate Establishment Clause).

The electric subsidy given by the City impermissibly subsidized a religious institution. The City gave no other church such a subsidy. It conveyed a message of City support for the LDS faith. *See Grand Rapids*, 473 U.S. at 397.

Because we conclude that the Constitution required the City to terminate the electric subsidy, Foremaster prevailed for purposes of attorneys fees under 42 U.S.C. § 1988.

II. Municipal Logo

We next consider the legality of the city's use of a logo depicting the local Mormon temple. Before reaching this issue, we must determine if Foremaster has standing to challenge the constitutionality of the logo. We find that he alleged sufficient non-economic injury to confer standing and that his move from St. George did not cause a loss of standing.

A. Standing

Again, we consider the constitutional requirement that the plaintiff allege an actual or threatened personal injury.[5] Standing under the Establishment Clause may be predicated on non-economic injury. *Valley Forge*, 454 U.S. at 486; *see e.g., United States v. SCRAP*, 412 U.S. 669, 686-687 (1973) (discouraging use of recyclable materials and adversely affecting the environment sufficient harm); *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153-154 (1970) (recognizing that "aesthetic, conservational, and recreational" injury is sufficient).

When alleging non-economic injury, the Supreme Court requires that the plaintiffs be "directly affected by the laws and practices against which their complaints are directed." *Valley Forge*, 454 U.S. at 486 n.22 (quoting *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963)).

In *Valley Forge*, the petitioners claimed that the government's conveyance of property to a Christian college violated the Establishment Clause. The petitioners were residents of Maryland and Virginia who learned of the transfer through news releases. None alleged that they would use the property located in Pennsylvania, but they contended that the transfer deprived them of the fair use of their tax dollars. The Court found that they lacked standing because they "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequences presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485 (emphasis in original).

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[5] We need not discuss taxpayer standing because Foremaster did not allege misuse of municipal funds. *See Flast v. Cohen*, 392 U.S. 83, 102 (1968); *Freedom from Religion v. Zielke*, 845 F.2d 1463, 1470 (7th Cir. 1988).

The circuit courts have interpreted *Valley Forge* in different ways. The Seventh Circuit requires that a plaintiff allege that a municipality's action offends him and that he has altered his behavior as a consequence of it. *See e.g., Freedom From Religion v. Zielke*, 845 F.2d 1463 (7th Cir. 1988) (residents had no standing to challenge Ten Commandments display in city park because they did not allege a change in behavior); *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986) (mere fact that display of lighted cross on public property offends plaintiff could not confer standing; he must allege that he altered his behavior to avoid the cross).

In contrast, the Sixth and Eleventh Circuits find standing based on an allegation of direct personal contact with the offensive action alone. *See e.g., Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (standing because plaintiffs were confronted directly by presence of word "Christianity" on the city seal); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) *cert. denied*, 475 U.S. 1047 (1986) (standing because plaintiffs alleged sectarian use of public property that impairs their use and enjoyment of property); *ACLU v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983) (although plaintiffs' underlying motivation could be described as a spiritual belief or a commitment to separation of church and state, they had demonstrated an individualized injury other than a mere psychological reaction).

We find particularly persuasive the Sixth Circuit's reasoning in *Hawley*. There, the plaintiffs claimed that the City violated the Establishment Clause by leasing space to a church for an airport chapel. The plaintiffs alleged that "the presence of a sectarian chapel impair[ed] their use and enjoyment of the public facility." *Hawley*, 773 F.2d at 739. In contrast to *Valley Forge*, the court found that the plaintiffs used the airport frequently and resided either in the city or county where

it was located. Interpreting *Rabun* it said: "[a] plaintiff challenging sectarian use of public property for impairing his actual use and enjoyment of that property has standing to challenge the impermissible activity." *Hawley*, 773 F.2d at 740.

Although we have not decided if a plaintiff must allege a change in his behavior to find standing, two of our cases are helpful. In an opinion before *Valley Forge*, *Anderson v. Salt Lake City Corp.*, 472 F.2d 29, 31 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973), residents sought to remove a granite monument of the Ten Commandments from the grounds of the city-county courthouse. We found standing to challenge the use of public property for religious purposes and did not require that the plaintiffs allege a change in their behavior. *Id.*

In *Bell v. Little Axe Ind. School Dist. No. 70*, 766 F.2d 1391, 1398 (10th Cir. 1985), we found that parents had standing to complain of religious meetings at their children's school. Relying on *Valley Forge*, we required that they allege a direct, personal injury, but did not require a change in behavior. *Id.*

Foremaster's allegations of direct, personal contact suffices as non-economic injury. He claimed that "the visual impact of seeing that Temple on a daily basis as part of an official emblem . . . has and continues to greatly offend, intimidate and affect me." Although he did not contend he changed his behavior, he did allege that the presence of the religious logo in the City Hall offended and intimidated him. His direct personal contact with offensive municipal conduct satisfied *Valley Forge*.

We next consider if Foremaster lost his standing by moving from St. George. In *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987), the plaintiffs claimed that the city seal with the word "Christianity" denigrated them. Regardless of the fact that some plain-

tiffs lived outside the city, the court found standing because they received city stationery with the seal and were "directly affronted by the presence of the allegedly offensive word on the city seal." *Id.* at 693.

Although Foremaster lives outside the city, he has frequent and close connection with it. He works within the city and his affidavit indicates that he is directly confronted by the logo on a daily basis, given the city's display of the logo on many of its vehicles, its stationery and within the nearby City Hall. Given this pervasive contact, *see Friedman*, 781 F.2d at 782, his current residence outside the city does not defeat his standing.

B. Establishment Clause

Because the district court relied on material outside the pleadings, we treat its dismissal as a summary judgment. *See Torres v. First State Bank of Sierra County*, 550 F.2d 1255, 1257 (10th Cir. 1977).

Again, we address the second prong of the *Lemon* test inquiring if the primary effect of the City's logo is to advance or inhibit religion. The district court found that the illustration of the St. George temple on the City's logo did not have the primary effect of endorsing the LDS church. *Foremaster*, 655 F. Supp. at 852. Finding a genuine issue of material fact, *we* remand for trial on the question of the logo's primary effect.

The effects prong asks "whether, irrespective of the government's actual purpose, the practice . . . conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 687. "Implicit symbolic benefit is enough, it need not be material and tangible advancement." *Friedman*, 781 F.2d at 781. We inquire what an average observer would perceive when viewing the action of the City. *See Allegheny*, 1989 U.S. Lexis 3467 at 31; *Friedman*, 781 F.2d at 781.

In *Allegheny*, the Supreme Court's most recent decision discussing the effects prong of the *Lemon* test, the Court focused on the "particular physical setting" of the object.[6] *Allegheny*, Lexis 3467 at 17. The Court stated that its task was to determine whether the display in its "particular physical setting" had the effect of endorsing or disapproving religious beliefs. *Allegheny*, Lexis 3468 at 17. It also considered the availability or nonavailability of secular alternatives. *Id.* at 30.

We find a genuine issue of material fact as to what an average observer would perceive when viewing the City logo. Mormon temples are central to both religious beliefs and proselytizing efforts. *Foremaster v. City of St. George*, 655 F. Supp. 844, 847-48 (D. Utah 1987). The Washington County Ministerial Alliance claimed that the "representation of the LDS Temple of the city logo/seal lends the power, prestige, endorsement and financial support of the city of St. George to one church to the exclusion of others." *Foremaster v. City of St. George*, 655 F. Supp. 844, 848 (D. Utah C.D. 1987). It also claimed that the other churches in the City are "attractive, beautiful, sacred" and visited by tourists. *Id.* Foremaster contended that "[t]he St. George LDS Temple is the universally identified symbol of Mormonism as practiced in the St. George area."

The LDS Church News says:

> These buildings, different from the thousands of regular church houses of worship scattered over the earth, are unique in purpose and function from all other religious edifices. It is not the size of these buildings, or their architectural beauty that makes them so. It is the work that goes on within their walls.

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[6] The majority opinion endorses the *Lemon* test, but Justice Kennedy's dissent, with Justices Rehnquist, White and Scalia joining, questions the test's utility and proposes an alternative analysis. *Allegheny*, 1989 U.S. Lexis 3467 at 51-53.

In contrast the affidavit of Sharon Isom states:

> [the Mormon temple] is not considered to be a trademark or religious symbol that is synonymous with that church or its beliefs, it is noted for its striking beauty and nineteenth century architecture and is more likely to be identified with the history and scenery of southwest Utah than anything else.

Foremaster, 655 F. Supp. at 849. Karl Brooks' affidavit states that the temple "necessarily plays a central role in any consideration of the area's history, culture, roots and tradition whether that consideration be secular or otherwise." *Id.* at 849.

There is a genuine issue of material fact as to whether the depiction of the temple in the context of the official St. George logo conveys primarily a message of governmental endorsement and advancement of the Mormon religion.

REVERSED AND REMANDED FOR A CALCULATION OF ATTORNEYS FEES AND REMANDED FOR A DETERMINATION OF THE PRIMARY EFFECT OF THE LOGO. FOREMASTER IS ALLOWED HIS COSTS ON THIS APPEAL.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 88-1235

PHILLIP L. FOREMASTER,
Plaintiff-Appellant,

v.

CITY OF ST. GEORGE, a political subdivision of the State of Utah,
Defendant-Appellee.

ORDER

Before HOLLOWAY, WRIGHT*, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges.

This matter comes on for consideration of appellee's petition for rehearing, with suggestion for rehearing en banc, filed in the captioned case.

Upon consideration of the petition for rehearing, the petition is denied by the panel to whom the case was argued and submitted.

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* Honorable Eugene A. Wright, United States Senior Judge for the Ninth Circuit, sitting by designation.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By /s/ [Illegible]
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH—CENTRAL DIVISION

Civil No. C85-1181G

PHILLIP L. FOREMASTER, *et al.*,
Plaintiffs,

vs.

CITY OF ST. GEORGE,
Defendant.

MEMORANDUM DECISION
AND ORDER

The court first heard plaintiff Phillip L. Foremaster's (Foremaster) motion for summary judgment on September 2, 1986. At that time the parties requested leave to file additional materials. Thereafter plaintiffs Rev. Paul S. Kuzy, Rev. Rhett Durfee, Rev. Lester Wollard, Rev. Emory P. Huey, Rev. Elmer Luther Royer, Rev. A. M. White, Rev. Alex Wilkie (collectively referred to as the Washington County Ministerial Alliance or Ministerial Alliance) filed a separate action. On November 20, 1986 an Order was entered consolidating the action of the Ministerial Alliance with that of Foremaster. On December 30, 1986, this matter came on regularly on motions by Foremaster and the Ministerial Alliance for summary judgment and on motions by defendant to dismiss portions of plaintiffs' complaints. Plaintiffs were represented by Brian M. Barnard and defendant was represented by T.W. Shumway. Plaintiffs and defendant submitted memorandums of law and the court heard oral argument, after which the court granted defendant's

motions to dismiss as to another phase of the case,[1] and took plaintiffs' motions for summary judgment under advisement. The court now being fully advised, sets forth its Memorandum and Decision regarding plaintiffs' motions.

FACTUAL BACKGROUND

This case involves a logo adopted and used by the City of St. George, Utah (City) for various purposes from approximately 1977 to present.[2] The logo depicts a local hill known as "Sugarloaf" with the word "Dixie" written on it, a setting sun, a golf course, a cluster of grapes, the motto "Where the Summer Spends the Winter," the words "City of St. George, Utah Incorporated 1862" and a sketch of the St. George Temple of the Church of Jesus Christ of Latter-day Saints (members of the Church of Jesus Christ of Latter-day Saints are commonly referred to as "Mormons" or as members of the "LDS" faith). The parties have submitted this case for decision based upon the filing of extensive admissions, answers to interrogatories, affidavits, exhibits, memorandums and published depositions from which this court has distilled the following relevant facts regarding the logo.

I. *Original Implementation and Use of the Logo*

In 1974 Rudger McArthur, Utilities Director of the City of St. George, directed that a "draftsman" be hired

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[1] In that portion of the case plaintiffs challenged a credit on its monthly electrical bills given by the City of St. George to the account of the St. George Temple of The Church of Jesus Christ of Latter-day Saints. The credit in effect constituted payment for a portion of the late-night illumination of the exterior of the St. George Temple. This court granted defendant's motion to dismiss plaintiff Foremaster's Complaint as to the electricity credit based upon lack of standing, and defendant's motion to dismiss the other plaintiffs' complaint as to the electricity credit issue based upon mootness in that the City had discontinued the credit. Jurisdiction of that phase of the case was retained by this court.

[2] *See* Appendix A.

to create a logo to be placed on City vehicles that would serve, in part, as a "descriptive, colorful, attraction-getting" symbol to advertise the St. George area. That original logo as described above was not immediately placed on City vehicles but was used on the official letterhead and stationary of the City from at least 1977 through April 1981. In 1981 the City adopted a new logo for use on its stationary which merely depicts a setting sun and the words "City of St. George" written across the sun. Sometime in 1983 the State of Utah informed the City that it was required to identify its motor vehicles. On September 15, 1983, the City counsel formally adopted the original 1974 logo for placement on vehicles, and the City ordered two hundred transfer decals. At that time decals were placed on the front doors of all City vehicles except police cars and emergency vehicles. At the end of 1984 the City decided that it would not place any new logos on its vehicles. However, at the time Foremaster's lawsuit was filed, the logo was still displayed on between eighty and ninety vehicles representing approximately two-thirds of the City's vehicles. The logo is also currently displayed on a wall plaque in the main foyer of the St. George City Hall and on two directional signs near the public parking lot of the Hall. In 1985 a public hearing was held after which the City refused to remove the logo from display. However, after this action was filed the City removed a flag located in the City Council chambers which displayed the logo. Also, the City has represented to this court and to plaintiffs that its intent since 1981 has been to retain the 1974 logo *only* "until replaced by the current logo adopted in 1981," except with regard to the one logo on the plaque displayed in City Hall.[3] The City intends to retain use of that plaque indefinitely unless enjoined by this court.

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[3] *See* Defendant's *Response to Plaintiff's Statement of Facts* at 21. Defendants have also offered to accelerate the phase-out begun in 1981 if this court determines that the case is moot and the following conditions are met:

II. *Religious Significance of Temples* [4]

"One of the distinctive features of the Church of Jesus Christ of Latter-day Saints is its teaching concerning the great importance of temples and the lasting significance of that which occurs in them." [5] According to Mormon belief, the gospel of Jesus Christ was restored to the earth through Joseph Smith who Mormons believe was a modern day prophet who received revelations from God.[6] Following the biblical pattern, Mormons believe God instructed Joseph Smith that certain sacred rites, "without [which people] cannot obtain celestial thrones," could be restored to the earth only through the building

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(1) removal of the logo not be required from the small historical plaque in the lobby of the City Office Building where the architect, contractor, etc. of the building are commemorated; (2) all other uses of the logo be completely and permanently terminated within 60 days from the date of judgment herein; (3) completion of the logo's removal not be considered an acknowledgment by the City of its original use was improper; and (4) completion of the phase-out not be considered a judgment in favor of plaintiff so as to justify an award of attorney's fees. Otherwise, defendants would submit this issue to the court. . . .

Defendant's *Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment Re: City Logo* at 1-2.

[4] Plaintiffs have filed a *Memorandum Re: Significance of Temples of the Church of Jesus Christ of Latter-day Saints.* This court's citations are to authorities cited in that memorandum.

[5] *Temples of the Church of Jesus Christ of Latter-day Saints* at 1 (1981) (introduction to publication of the Corporation of the President of The Church of Jesus Christ of Latter-day Saints) [hereinafter cited as *Temples*].

[6] *See* Explanatory Introduction to *The Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints*, ". . . a collection of divine revelations and inspired declarations given for the establishment and regulation of the kingdom of God on the earth in the last days." Section 20 of that book specifically deals with restoration of the "gospel of Jesus Christ."

of temples.[7] Mormon history demonstrates that even during poverty and affliction, Mormons obeyed what they considered to be a directive from God to build temples.[8] Today there are forty operating Mormon temples throughout various parts of the world and seven under construction and in the planning stages. It is the goal of Mormon leaders to have a temple "in all parts of the world."[9]

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[7] *Temples* at 60.

[8] That history begins in 1832 when according to Mormon teaching, Joseph Smith received a revelation that a temple should be built in Kirtland, Ohio. See B. Packer, *The Holy Temple* at 128 (1980) [hereinafter cited as *Holy Temple*]. Two years later the Kirtland Temple was abandoned and its founders moved as a result of religious opposition. J. Talmage, *House of the Lord* at 12 (1968). In April 1838, revelation was again received by Mormon authorities that a temple should be built in Far West, Missouri, but again due to religious opposition that temple was never completed. *Id.* at 103-04. Thereafter as a result of revelation, construction of a temple was undertaken on April 6, 1841 in Nauvoo, Illinois. *Id.* at 105; *House of the Lord* at 143. However, by September 1846 the completed Nauvoo Temple was in the possession of those who opposed the early Mormons. *House of the Lord* at 112. Despite fears of persecution in continuing to build temples, Brigham Young, president of the faith, persuaded his followers to begin building a temple in Salt Lake City, Utah in 1852. *Holy Temple* at 177-78. On November 9, 1871, President Brigham Young and other Mormon authorities broke ground for the St. George Temple. *House of the Lord* at 176. That temple was the first Mormon temple to be completed in Utah and was dedicated in 1877. *Id.* at 180. [Wilford W. Kirton, Jr., General Counsel of The Church of Jesus Christ of Latter-day Saints has filed an affidavit in this case in which he states that *Holy Temple* and *House of the Lord* are "authentic learned treatises within the meaning of Rule of Evidence 803(18) on the subject of history of the Temples of the Church of Jesus Christ of Latter-day Saints and the doctrine of the Church affecting Temples."]

[9] Deseret News, *150 Years of Building Temples in the Church*, Section LDS Church News at 13 (March 16, 1986) (quoting past Mormon President Spencer W. Kimball.)

Mormons attach great significance to the activities in which they engage within Mormon temples. Admission to temples is not open to the public once they have been "dedicated" for use through a religious ceremony.[10] Further, even admission among members of the faith is restricted according to ecclesiastically established standards of "worthiness."[11] Although "temple ordinances" and "temple ceremonies" are kept confidential,[12] the authorities of the Mormon faith have disclosed certain information about the activities engaged in within their temples. For instance, "temple endowments" have been described as "instruction relative to the purpose and plans of the Lord in creating and peopling the earth . . . [and the teaching of] what must be done . . . to gain exaltation."[13] Mormon ecclesiastical authorities have also disclosed that worthy men and women may be "sealed in the holy bond of eternal matrimony" in temples.[14] Similarly, husbands and wives may be "sealed" with their children. According to Mormon doctrine "sealing ordinances" enable families to remain associated for eternity.[15] Mormons are also counseled to engage in genealogical research so that their ancestors can be sealed together for eternity through the performance of vicarious temple ordinances by living persons acting for the dead.[16] Mormons also believe that "[w]ith proper authority a mortal person [can] be baptized for and in behalf of someone who had not had the opportunity before passing on. That individual would

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[10] *Holy Temple* at 33.

[11] *Id.* at 49-50.

[12] *Id.* at 26.

[13] *See* Holy Temple at 153-54 (quoting the "two published definitions or descriptions of the endowment").

[14] Temple at 44.

[15] *Id.*

[16] *Holy Temple* at 223.

then accept or reject the baptism in the spirit world, according to his own desire." [17] According to Mormon history, temples are also considered to be sacred places wherein personal revelations from God have been received.[18] Mormon temples are also significant to Mormon proselyting. Most temple grounds have Visitor Centers which serve to advertise and proselyte for the Mormon religion. At such centers visitors are given copies of the *Book of Mormon*, which Mormons believe is scripture. Names and addresses are also obtained for active proselyting done by missionaries and other representatives of the religion. As an example, 218,000 people visited the Visitor's Center of the St. George Temple in 1983.[19]

III. *Individual Perceptions of the Logo as a Symbol*

A number of affidavits have been offered which disclose individual observations and opinions as to the "typical" perception of the public with regard to the message

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[17] *Id.* at 18.

[18] A recent example is a statement made by current Mormon President Ezra Taft Benson at a dedication of the newest Mormon temple:

> This temple will be a constant, visible symbol that God has not left man to grope in darkness. It is a place of revelation.
>
> Though we live in a fallen world—a wicked world—holy places are set apart and consecrated so that worthy men and women can learn the order of heaven and earth and obey God's will. I testify that temples are places of personal revelation. There have been times when I have been weighted down by a problem or a difficulty and have gone to the house of the Lord with a prayer in my heart for answers. These answers have come in clear and unmistakable ways.

Deseret News, *40th Temple dedicated in Denver*, Section LDS Church News at 3 (December 2, 1986) *see also Holy Temple* at 242-55; Plaintiff's *Memorandum Re: Significance of temples of the Church of Jesus Christ of Latter-day Saints* at 4-10 (documenting accounts of revelations received by Mormons at temples).

[19] Defendant's *Response to Plaintiff's Statement of Facts* at 5-6.

that is portrayed by the sketch of the St. George Mormon Temple on the logo of the City of St. George. Those set forth herein are typical of the different perceptions presented by the parties. These are important because the parties have submitted this case for resolution based upon the record.[20]

Each of the plaintiffs who make up the Washington County Ministerial Alliance has filed an affidavit expressing his perception that:

> representation of the LDS Temple on the city logo/seal lends the power, prestige, endorsement, and financial support of the City of St. George to one church to the exclusion of others. This conduct creates coercive pressure, both direct and indirect, upon other religious groups and their members to conform to the prevailing (and apparently officially approved) religion. This conduct constitutes a danger to the freedoms and rights of the religious minorities in the City of St. George.

A typical affidavit submitted by the Ministerial Alliance also sets forth that the non-Mormon churches and buildings in St. George are "attractive, beautiful, sacred and are of great interest to the members of our church. Tourists and members of our faith, passing though St. George, often stop and worship with our congregation at our church." Plaintiff Foremaster has also filed an affidavit

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[20] In defendant's first memorandum in opposition to plaintiff's motion for summary judgment the City took the position that there were material issues of fact that would preclude this court from granting summary judgment. However, at oral argument on September 2, 1986, the city took the position that there were very few disputed issues of fact but that plaintiffs' statement of "undisputed facts" contained contestable legal conclusions about the ultimate issues in this case. The present position of both parties is that this court can determine the ultimate issue of whether an objective viewer would consider the City logo to be an endorsement of the Mormon religion based upon the evidence in the record.

in which he states that his parents were members of the Mormon faith and that he was baptized into that faith. Foremaster states that as a symbol a Mormon temple has significant meaning to members of that faith. Further, based upon personal and family ties with Mormonism, and general activities in the St. George area, Foremaster states that the St. George Mormon Temple is the "unmistakable symbol to Mormons and non-Mormons of Mormonism as practiced in the St. George area." Foremaster also states that the logo "connotes to the average and casual observer a governmental sponsorship or approval of the LDS religion."

The City of St. George has filed the affidavit of Karl Brooks, mayor of the City, in which essentially he states that based upon experience as a member of the Mormon religion, "there is little if any relationship between the facade and exterior appearance of the temple and the religious ceremonies that are conducted within its walls. . . ." Brooks further states:

> [I]f [the Mormon temple] is symbolic of anything, it symbolizes the history of the southwest corner of the State which we refer to as "Dixie"; that it necessarily plays a central role in any consideration of the area's history, culture, roots, and tradition, whether that consideration be secular or otherwise. . . .

Defendant has not filed the affidavit of Sharon Isom, who is a member of the City Council and a member of the Mormon religion. Based upon her contact with people who have varying degrees of religious interest she states:

> [The Mormon temple] is not considered to be a trademark or religious symbol that is synonymous with that church or its beliefs; [rather] it is noted for its striking beauty and 19th century architecture and is more likely to be identified with the history

> and scenery of southwest Utah than anything else; [the temple] is distinctive, different from any other church building in the world and creates a feeling of pride among residents of the community as it is uniquely representative of St. George and southwestern Utah. . . .

LEGAL ANALYSIS

I. *Establishment Clause*

Plaintiffs in this case allege that depiction of the St. George Mormon Temple on the logo of the City of St. George violates the Establishment Clause of the First Amendment.[21] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court set down a three part test that remains the mainstay of Establishment Clause cases. According to the *Lemon* test the Establishment Clause is violated if any of the following three independent conditions are not met: (1) the governmental action must have a secular purpose; (2) the principle or primary effect of the governmental action must be one that "neither advances nor inhibits" religion; and (3) the governmental action must not foster an excessive government entanglement with religion. *Id.* at 612-13.

The *Lemon* test was recently applied by the Tenth Circuit to a county seal adopted by Bernalillo County, New Mexico. *Friedman v. Board of County Commissioners of Bernalillo*, 781 F.2d 777 (10th Cir. 1985). In *Bernalillo* the court described the seal as follows:

> The circular seal that plaintiff challenges in this action . . . contains the phrases, "Bernalillo County," and "State of New Mexico," separated by two diamonds along its outermost green edge. Within an inner circle, the Spanish motto, "CON ESTA VENCEMOS," which translates into English as, "With This we Conquer," or "With This we Overcome," arches over a golden latin cross,[1] highlighted by white

> edging and a blaze of golden light. The motto and cross are set in a blue background depicting the sky over four darker blue mountains and a green plain. Eight white sheep stand on the plain.

Id. at 779 (the court's footnote states that the cross occupies roughly half of the seal). The district found that the significance of the cross and the sheep on the county seal was solely historical and therefore the seal passed all three parts of the *Lemon* test. However, the Tenth Circuit reversed as clearly erroneous the district court's determination on the "effects" prong of *Lemon*. *Id.* at 780.[22] The court described the effects test as follows:

> [T]he existence of a non-secular effect is to be judged by an objective standard, which looks only to the reaction of the average receiver of the government communication or average observer of the government action. . . . If the challenged practice is likely to be interpreted as advancing religion, it has an impermissible effect and violates the Constitution, regardless of whether it actually is intended to do so. In addition, the resulting advancement need not be material or tangible. An implicit symbolic benefit is enough.

Id. at 781. In concluding that the county seal had the effect of "advertising" the Catholic faith to the objective viewer, the court emphasized two critical factors. First, the court looked at the message of oppression that in the eyes of some was symbolized by the Bernalillo County cross and motto. Specifically, the court discussed expert testimony from historians to the effect that religious conversion of the Native American population in New Mexico was sometimes accomplished through forcē. Another historian testified of the use of Spanish Inquisition tactics in New Mexico. With that historical background,

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[22] The court did not disrupt the district court's determination on the other two prongs of *Lemon*. *Id.* at 780 n.3.

the court considered further expert testimony that the motto, "With This We Conquer," referred explicitly to the cross pictured on the seal. The court also considered testimony that the cross had at times symbolized outright oppression and persecution of Jewish people. The Tenth Circuit concluded that based upon that background, the "seal certainly does not memoralize . . . [the Native American] 'Christian heritage' but rather that of those who sought to extinguish their culture and religion." *Id.* at 782.

The second factor of great importance in the court's determination was the context within which the seal was displayed. The court first noted that the cross was prominently displayed on the logo and occupied approximately half of the seal. *Id.* at 779 n. 1. The court also emphasized that the seal itself was used on county vehicles and to identify law enforcement officers, thereby creating doubt in the mind of a follower of a non-Christian religion about the even-handedness of the enforcement officer's treatment. The court distinguished the religious prominence of the cross and motto from the creche in *Lynch v. Donnelly*, 465 U.S. 668 (1984) which was displayed within a "generally secular commercial display." The court also pointed out that "the seal, unlike the creche, pervades the daily lives of county residents." 781 F.2d at 782. Finally, the court observed that a less conspicuous use of the seal, such as "a notary seal on county documents or a one-color depiction in which the seal and especially the cross are not easily discernible might" pass Constitutional scrutiny. *Id.* at 781.

The plaintiffs in this case rely exclusively on the effects prong of the *Lemon* test to attack the logo of the City of St. George. Therefore, the critical issue becomes whether the City's logo, as in *Bernalillo*, has the primary effect of conveying to that average observer that the City is endorsing or advertising a particular religion. The parties have agreed that such determination is "a legal question

to be answered on the basis of judicial interpretation of social facts." [23] After careful review of the facts this court determines that the City's logo is distinguishable from the seal in *Bernalillo* and properly passes the effects prong of *Lemon*.

The context within which the Mormon temple is depicted is far different than the singular message of the cross and motto in *Bernalillo*.[24] The City logo depicts a number of secular attractions in the St. George area including a golf course, the local red rock formations, a blazing sun, and the Virgin River. The motto "Where the Summer Sun Spends the Winter" also portrays a seecular message. The word "Dixie" written upon the red rocks is also generally regarded as a reference to the comparatively mild climate of the area. In those circumstances one clear message of the logo is that "these are the things to do and places to see in the City of St. George." The Mormon Temple also fits within that secular message. The parties agree that the St. George Mormon Temple is a building "of striking and dramatic design and architecture . . . [which] is the predominant man-made structure of the entire city and area. The pure white stucco exterior of the . . . Temple makes it stand out from the surrounding natural red sand and stone of the area." [25] The temple thus has a secular beauty and

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[23] *See Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring); *American Civil Liberties Union of Illinois v. City of St. Charles*, 622 F. Supp. 1542, 1546 (D.C. Inc. 1985), *aff'd* 794 F.2d 265 (7th Cir. 1986).

[24] In *Bernalillo* the cross occupied approximately half of the entire seal and the only other illustration on the seal was a sketch of eight sheep. There was a vigorous dispute over whether the sheep represented the "flock of Jesus," or the historical importance of the sheep-raising industry in Bernalillo County. 781 F.2d at 779.

[25] *Statement of Undisputed Facts in Support of Plaintiff's Motion for Summary Judgment* at 6; *Defendant's Response to Plaintiff's Statement of Facts* at 7.

attraction apart from the building's religious significance.[26]

The symbolic significance of the St. George Mormon Temple is also distinguishable from the cross in *Bernalillo*. In *Bernalillo* the court emphasized that the cross exemplified the regional history of oppression and persecution by those who embraced the cross as their religious symbol. The Mormon temple does not carry a similar message.[27] However, plaintiffs contend that a Mormon temple is a powerful symbol of the "core, main tenets, basic thought and essence" of the Mormon religion that cannot be removed regardless of the secular context within which the temple appears. Plaintiffs point out that Mormons conduct confidential sacred rites within temples and that temples are places where faithful members of the religion claim to have received personal revelations. It is also stressed that Mormon temples may symbolize the continued perseverance of the religion's faithful against historical persecution, and that temples are significant proselyting tools of the Mormon faith.

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[26] Plaintiffs argue that the City's logo, like the Bernalillo County seal, and unlike the *Lynch* creche, pervades the daily lives of City residents. Although such pervasiveness is clearly an important factor it is not determinative given the otherwise secular context within which the Mormon temple is illustrated. In addition, the pervasiveness here is not necessarily the same as in *Bernalillo* because here the logo is not used on police or emergency vehicles.

[27] Plaintiffs have attempted to argue that the St. George Temple "may be a reminder of the Mountain Meadows Massacre of the 1850's where members of the LDS Church slaughtered non-Mormons traveling through Southern Utah. . . ." Plaintiffs' argument is unpersuasive. Whatever speculative present day "oppression" of non-Mormons of all races may be said to exist pales in comparison with the reality of lingering oppression of Native Americans that was recognized in *Bernalillo*. In other words, we find it highly unlikely that a non-Mormon with knowledge of Mormon history, including the "Mountain Meadows Massacre," would suffer in any way from anxiety in dealing with a Mormon as a result of that knowledge.

In those circumstances, plaintiffs conclude that "[s]ymbolically, a cross is to Christianity as a temple is to the [Mormon] Church."

However, the fact that Mormon temples have great religious significance does not necessarily result in a violation of the Establishment Clause of the First Amendment. The Supreme Court in *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) recognized that a creche has great religious significance. Nevertheless, the court emphasized that the relevant inquiry is whether the *primary effect* of the governmental action is to create an endorsement of religion. *Id.* at 681-82. In *Lynch* the Court concluded that despite the religious significance of the creche the City's display could not be considered

> more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, *Board of Education v. Allen*, [;] . . . expenditure of public funds for transportation of students to church-sponsored schools, *Everson v. Board of Education*[;] . . . federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, *Tilton*[;] . . . noncategorical grants to church-sponsored colleges and universities, *Roemer v. Board of Public Works*[;] . . . and the tax exemptions for church properties sanctioned in *Walz* . . . . It would also require that we view it as more of an endorsement of religion than the Sunday closing Laws upheld in *McGowan v. Maryland*[;] . . . . the release time program for religious training in *Zorach*[;] . . . . and the legislative prayers upheld in *Marsh*. . . .

Id. The logo of the City of St. George is no more an endorsement of religion than the numerous examples given by the Supreme Court of cases where a governmental benefit or endorsement of religion has passed

Constitutional scrutiny. The religious significance of a Mormon temple is not so pervasive as necessarily to overcome an otherwise secular message concerning the beauty and attractiveness of a particular area. Within the facts of this case this court holds that the illustration of the St. George temple on the City's logo does not have the primary effect of conveying a message of religious endorsement to the objective viewer.

II. Equal Protection

The Ministerial Alliance plaintiffs have alleged that portrayal of the Mormon St. George Temple on the City's logo violates the Equal Protection Clause of the Fourteenth Amendment. The Ministerial Alliance takes the position that their fundamental rights of religious freedom are "tramped upon" by the City's endorsement of the Mormon faith. However, the plaintiff's argument necessarily fails given this court's determination that depiction of the St. George Temple in a clearly secular context does not have a primary or principal effect of endorsing the Mormon religion. The only "distinction" made by the City's logo is between popular attractions in the City of St. George. As a result there is no suspect class or fundamental right involved that would require a heightened "strict scrutiny" analysis under equal protection. Accordingly, distinctions among the City's popular attractions clearly pass the "rational basis test" of equal protection. Indeed, the plaintiffs in their own statement of undisputed facts have said that the St. George Temple is a building "of striking and dramatic design and architecture . . . [which] is the predominant man-made structure of the entire City and area." Plaintiffs, however, also contend that the buildings and chapels used by the Ministerial Alliance are "attractive, beautiful, sacred and of great interest to the members of our church" and to others. While this court does not doubt plaintiffs' statement, the City does not have unlimited space available on

its logo to portray all of the beautiful buildings and natural attractions in the City of St. George. In those circumstances, it is rational for the City to choose the Mormon temple along with other natural attractions as being of interest to those who visit St. George.

Based upon the above analysis Plaintiffs' motion for summary judgment is denied. This Memorandom Decision and Order will suffice as the court's final action on this motion; no further Order need be prepared by counsel.

DATED: February 24, 1987.

/s/ J. Thomas Greeme
J. THOMAS GREENE
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH—CENTRAL DIVISION

Civil No. C85-1181G

PHILLIP L. FOREMASTER, *et al.*,
Plaintiffs,

vs.

CITY OF ST. GEORGE,
Defendant.

WASHINGTON COUNTY MINISTERIAL ALLIANCE, *et al.*,
Plaintiffs,

vs.

CITY OF ST. GEORGE,
Defendant.

MEMORANDUM DECISION AND ORDER

These consolidated cases have been before the court on several previous occasions in connection with plaintiffs' claims that partial defrayal of the cost of nighttime lighting of the LDS Temple at St. George, Utah by the City of St. George through issuance of a credit on the electrical bill was in violation of the Establishment Clause of the United States Constitution, and that the use of a logo on City property by the City which depicted the Temple also was in violation of the Constitution. In previous action, this court dismissed the Foremaster complaint as to the so-called electrical subsidy credit issue (hereafter "electrical subsidy") for lack of standing, and

dismissed the Ministerial plaintiffs' complaint as to that issue because of mootness. (Order dated February 2, 1987.) Also, this court previously denied motions for summary judgment with reference to claimed unconstitutional depiction of the LDS Temple on the St. George City logo. *Foremaster v. City of St. George*, 655 F.Supp. 745 (D. Utah 1987). The parties now have filed cross motions to dismiss as to the logo aspect of the case, and have submitted that matter for decision. Based upon the record before the court, defendant's motion is now granted and the actions are dismissed as to the logo issue for the reasons set forth in the court's published opinion.

The matter is now before the court on plaintiffs' motions for attorney fees and costs. Plaintiffs urge that attorneys fees should be awarded notwithstanding dismissal of the actions because they were "catalysts" and should be determined to be "prevailing parties" for award of attorneys fees pursuant to 42 U.S.C. § 1988 under the doctrine of *Nadeau v. Helgemoe*, 581 F.2d 175 (1st Cir. 1978). This court contemporaneously herewith has made and entered Findings of Fact and Conclusions of Law after hearings and extensive review of the evidence received and the legal memorandums which were submitted.

A. *Legal Principles*

In formulating the "catalyst" test, the *Nadeau* court posed "two critical questions" for determination of whether plaintiffs are prevailing parties as to issues resolved without direct judicial action. The first question was said to be one of fact, dependent upon whether plaintiffs can establish that their suit was "causally related to the defendants' actions which improved their condition"; the second question was said to be one of law, i.e., whether defendants' conduct is "required by law." *Id.* at 281. In defining the causation requirement, the Tenth Circuit has said:

> In addition, plaintiffs' conduct, as a practical matter, must have played a *significant role* in achieving the objective. . . . This causation can be the initial catalyst in producing action, or can be the constant prodding that motivates a defendant to go further than it otherwise would have.

Chicano Police Officer's Association v. Stover, 624 F.2d 127, 129-130 (10th Cir. 1980) (emphasis added). The two-part catalyst test was adopted and utilized by the Tenth Circuit in *Gurule v. Wilson*, 635 F.2d 782 (10th Cir. 1980); *Operating Eng. Loc. U. No. 3 of Inten. Union v. Bohn*, 737 F.2d 860, 863 (10th Cir. 1984); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1473 (10th Cir. 1985); and *Supre v. Ricketts, et al.*, 792 F.2d 958 (10th Cir. 1986). In *Ricketts*, the test was formulated as follows:

> The plaintiff must demonstrate that his lawsuit is linked causally to the relief obtained, i.e. the suit must be a "substantial factor or a significant catalyst" in prompting the defendants to act or cease their behavior. He must also demonstrate that the defendant's conduct in response to the lawsuit was required by the Constitution or federal law, i.e. the defendant's action must be legally required.

792 F.2d at 962.

B. *Application in This Case*

1. The Logo

Under this court's prior ruling, none of the plaintiffs were prevailing parties as to the logo issue because the principal or primary effect of the logo is secular, neither advancing nor inhibiting religion under the "effects" prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), consistent with *Friedman v. Board of County Commissioners of Bernalillo*, 781 F.2d 777 (10th Cir. 1985). Accord-

ingly, the second prong of the *Nadeau* test was not met because removal of the logo from City property, even if in response to the lawsuit, was not "required by law."

2. The Electrical Subsidy

a. Plaintiff Foremaster

As to the Temple lighting issue, Foremaster is not a prevailing party because he had no standing and hence did not and could not receive relief on the merits of his claim. *Valley Forge College v. American United*, 454 U.S. 464 (1982). In *Valley Forge*, the Supreme Court held that respondents had no standing to sue as federal taxpayers, and that under prior applicable precedents they also had no standing as citizens to assert an abstract injury because of nonobservance of the Constitution. As to the claim that plaintiffs had suffered "injury in fact" by violation of a "personal constitutional right" created by the Establishment Clause, the court said that plaintiffs

> fail to identify any personal injury suffered *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art III, even though the disagreement is phrased in constitutional terms. It is evidence that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Id. at 485-86. The court went on to hold: "We simply cannot see that respondents have alleged an injury of any kind, economic or otherwise, sufficient to confer standing." *Id.* at 486.

The same principles govern the case at bar, except that in this case Foremaster hasn't even a colorable claim of right to sue as a taxpayer because he paid no taxes for lighting the Temple, being a nonresident of St. George, Utah. Since Foremaster lacks standing, no relief on the merits of his claim could be granted. Nor could Foremaster have forced relief without the benefit of a formal judgment, such as through a consent decree or settlement. The Supreme Court recently has noted that to prevail in court at least some relief on the merits of plaintiff's claim must be granted. In *Hewitt v. Helms*, 107 S.Ct. 2672 (1987), a plaintiff received an "interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim." The court noted that such an interlocutory order, even though stating the law favorably to the plaintiff "is not the stuff of which legal victories are made," and said:

> In order to be eligible for attorney's fees under § 1988, a litigant must be a "prevailing party." Whatever the outer boundaries of that term may be, Helms does not fit within them. Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.

Id. at 2675.

Further, since Foremaster was found to lack standing he may not "prevail" under the catalyst test. In *Hewitt*, plaintiff had claimed, in the alternative, that a hearing was required to determine whether Helms' lawsuit had in fact caused a change in the defendant's conduct. With respect to this claim the Supreme Court said:

> We need not decide the circumstances, if any, under which this "catalyst" theory could justify a fee award under § 1988 because even if Helms can demonstrate a clear causal link between his lawsuit and the

> State's amendment of its regulations, and can "prevail" by having the state take action that his complaint did not in terms request he did not and could not get redress from promulgation of the informant-testimony regulations. When Directive 801 was amended Helms had long since been released from prison. Although he has subsequently been returned to prison, and is presumably now benefiting from the new procedures (to the extent that they influence prison administration even when not directly being applied), that fortuity can hardly render him, retroactively, a "prevailing party" in this lawsuit, even though he was not such when the final judgment was entered.

Id. at 2677. In *Hewitt*, even if the defendant did change its conduct as a result of plaintiff's lawsuit, plaintiff "did not and could not get redress from [the change]," *Id.* because he had been released from prison, and his claim therefore was moot. Accordingly, under the first prong of the *Nadeau* test the plaintiff could not show "actions which improved [his] condition" even if such were "casually related." In this case Foremaster faces a similar problem. Since Foremaster did not sustain "injury in fact" sufficient to confer standing, he did not and could not benefit or get redress from a change in St. George's conduct. Accordingly, whether or not Foremaster's suit in fact caused or contributed to any change, he may not be considered a prevailing party.

b. Ministerial Plaintiffs

The Ministerial plaintiffs fail the first prong of the *Nadeau* test as formulated by the Tenth Circuit in that their lawsuit was not a substantial factor or a significant catalyst in causing termination of the electrical subsidy. It is manifest that by the late date the Ministers finally filed their lawsuit, November 3, 1986, the electrical subsidy already was terminated, subject only to confirma-

tion or ratification by the City Council, a majority of the members of which had already approved the action informally. From the totality of facts and circumstances, this court has found that the final termination result came about, and would have occurred, without the action of the Ministers. Since the result would have happened without the Minister's action, it cannot be said that they "caused" the result.

We need not reach or rule upon the second prong of the *Nadeau* test as to the electrical subsidy issue, i.e., whether defendant's conduct was "required by law." Although it is clear that termination of the subsidy was fully accomplished prior to the hearing on December 30, 1986, when the cases were dismissed, this court retained jurisdiction in the event that the electrical subsidy should be reinstated or again be made available by the City to the LDS Temple. No suggestion is here made by counsel that the practice has been resumed, but the court continues to retain jurisdiction in the matter.

For the aforesaid reasons, plaintiffs' motion to tax attorneys fees and costs is denied, and defendant's motion denying attorneys fees is granted as against all plaintiffs.

IT IS SO ORDERED.

DATED: December 17, 1987.

/s/ J. Thomas Greene
J. THOMAS GREENE
United States District Judge

COPIES TO:

12/18/87

Brian M. Barnard, Esq.
T.W. Shumway, Esq.
Steven E. Snow, Esq.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH—CENTRAL DIVISION

Civil No. C85-1181G

PHILLIP L. FOREMASTER, *et al.*,
Plaintiffs,

vs.

CITY OF ST. GEORGE,
Defendant.

WASHINGTON COUNTY MINISTERIAL ALLIANCE, *et al.*,
Plaintiffs,

vs.

CITY OF ST. GEORGE,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for hearing on July 13, 1987, and for evidentiary hearing on October 15 and 16, 1987, on motion to tax attorneys fees and costs of plaintiff Phillip Lang Foremaster ("Foremaster") and plaintiff Washington County Ministerial Alliance and ministers individually named as plaintiffs ("The Ministerial Plaintiffs"). Defendant's Motion for denial of Attorneys Fees was also before the court as were mutual motions to dismiss any remaining claims for use of defendant's logo/seal. Plaintiffs were represented by Brian M. Barnard and C. Dane Nolan. Defendant City of St. George

was represented by Steven E. Snow and T. W. Shumway. The parties had filed memorandums of law and fact as well as supporting and opposing affidavits. The court received additional filings at or immediately before the hearing, and all of the previously taken depositions were published. Witnesses were called and testimony was received, and various exhibits were received into evidence. The matter was argued extensively by counsel, after which it was taken under advisement. The court has reviewed all of the materials and evidence presented, and herewith enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Phillip Lang Foremaster is and at all pertinent times was a resident of Quail Lake (part of Hurricane City) in Washington County, Utah.

2. Plaintiff Washington County Ministerial Alliance is an unincorporated association consisting of non-LDS ministers in the St. George, Utah area. There are no formal officers of the Alliance, and one minister serves alternatively as a moderator for the group.

3. The individual plaintiffs are non-LDS ministers in St. George, Utah, as follows: Rev. Paul S. Kuzy, St. George Catholic Church; Rev. Rhett Durfee, First Southerr Baptist Church; Rev. Lester Wollard, Radio Ministery; Rev. Emory D. Huey, First Southern Baptist Mission; Rev. Elmer Luther Royer, Assembly of God Church; Rev. A.M. White, Assoc. Pastor First Southern Baptist Church; Rev. Alex Wilkie, Pastor, Community Baptist Church.

4. The Church of Jesus Christ of Latter-day Saints is herein referred to as the LDS Church and is also sometimes referred to as the Mormon Church. The St. George LDS Temple is an edifice in St. George, Utah owned by the LDS Church, officiated over by a President who has

the immediate responsibility concerning operation and ceremonies within the structure.

5. Since approximately 1942 the City of St. George, Utah has given a credit to the St. George LDS Temple on its electrical utility bill in connection with the lighting of that edifice after 10:00 p.m. at night. This so-called "electrical subsidy" has existed through the years and has partially defrayed the cost of lighting the edifice during the nighttime in the approximate amount of $180 per month in recent times. There are no references to the authorization, continuation or cessation of this credit in the minutes of the City Council of St. George.

6. In July 1984, after a conversation with a public official concerning the electrical credit, Foremaster wrote to the Utility Commission of the City of St. George and demanded that the City's subsidy on the electrical bill to the LDS St. George Temple be terminated.

7. The matter of the City's "electrical subsidy" became a matter of public knowledge and discussion in the fall of 1984, and has continued thereafter to be a "high profile" matter of debate, pro and con, in the St. George, Utah area.

8. In June 1985, Clayton Huntsman, an attorney, on behalf of Foremaster, wrote a letter to the Utility Commission of the City of St. George and a letter to the City Council of St. George, demanding that the subsidy of the electrical bill to the LDS St. George Temple be terminated, threatening litigation. Mr. Huntsman also raised the issue of the representation of the Temple on the logo used by the City, and demanded its cessation. T. W. Shumway, the St. George City Attorney (hereinafter "Shumway"), responded by letter dated June 27, 1985, informing Huntsman and Foremaster that the electrical subsidy was "wholly legal" but that he would present the matter for consideration to the City Council. In a subsequent letter dated August 16, 1985, to Fore-

master, Shumway gave notice that the City Council had set a public City Council hearing to discuss the lighting issue on September 26, 1985, inviting participation at the meeting and requesting that any litigation be deferred until after that meeting.

9. On September 9, 1985, Huntsman informed City Attorney Shumway that he represented the Washington County Ministerial Alliance "in the complaint against St. George City and the Utility Commission involving the unlawful use of ratepayer money to maintain a religious establishment, to wit the LDS Temple." Mr. Huntsman also expressed concern about the City logo and made reference to his prior communication dated June 25, 1985, which had been written on behalf of Foremaster. The letter was answered by Shumway on September 13, inquiring as to the identity of the members of the Ministerial Alliance and transmitting a memorandum in which he opined as to the legality of the credit, which memorandum had been submitted previously to Mr. Huntsman's "former client" Foremaster. Members of the Ministerial Alliance were later invited to attend the hearing scheduled for September 26, 1985 to discuss the lighting issue.

10. On September 26, 1985, there was a hearing before the St. George City Council during its formal meeting. Foremaster, Huntsman and members of the Washington County Ministerial Alliance, including some of the named ministerial plaintiffs in this action, Rev. Lester Wollard, Rev. Paul Kuzy, Rev. Mel White, Rev. Rhett Durfee and Rev. Alex Wilkie, were present. City Manager Gary Esplin also was present at the meeting as were the City Council members except for Councilman McArthur and the Mayor, who was represented by Sharon Isom, acting as Mayor Pro Tem. Other members of the public were present as well, speaking pro and con with respect to the issue of the electrical subsidy. Rev. Rhett Durfee read a prepared statement on behalf of the Min-

isterial Alliance demanding an end to the electrical subsidy. No decision was made at the meeting, but it was determined that the matter should be further discussed "as a full Council with the City Attorney."

11. In early October 1985, one of the plaintiffs, Rev. Rhett Durfee, wrote to St. George Mayor, Carl F. Brooke, expressing appreciation for those members of the Council who "appeared to want to listen and gain an understanding" of the position of the Ministers as presented at the September 26, 1985 meeting, and complaining of "uncourteous treatment" afforded by one member of the City Council at that meeting. Mayor Brooke responded by letter dated October 11, 1985, expressing regret that Temple lighting was being made a religious issue rather than a "promotional activity calculated to advertise the community," expressing hope to avoid this as a "devisive issue," and suggesting that in the best interests of the community the Council could change the present policy even "if it is legal" (as the Council had been advised by the City Attorney) if it became convinced to do so.

12. On October 11, 1985, in a letter to Foremaster, City Attorney Shumway indicated that the City Council "would like to further evaluate its position" and could be expected to continue or abandon its present policy at a meeting scheduled on October 17, 1985.

13. On October 14, 1985, at a meeting of the Ministerial Alliance attended by attorney Huntsman, it was decided that the Alliance should "stay on the edge" of any litigation, and a consensus was reached that any legal action by the Ministerial Alliance should be held "in reserve" to see what happened to the suit by Foremaster which they were informed was about to be filed.

14. On October 17, 1985 at a meeting of the City Council of St. George the matter was fully discussed and a decision to maintain the present policy regarding light-

ing of the Temple was made. The decision was transmitted to Foremaster and to Huntsman the next day, October 18, 1985.

15. On October 19, 1985, Foremaster mailed his initial *pro se* complaint in this action to the Clerk of this Court in Salt Lake City, Utah, and provided a copy to Shumway. That complaint sought (1) termination of the electrical subsidy granted to the St. George LDS Temple, and (2) an end to the City's use of a seal logo which depicts the LDS Temple.

16. Shortly after the lawsuit by Foremaster was filed, the Ministerial plaintiffs instructed their attorney, Huntsman, to go no further with a draft complaint which he had prepared on their behalf. Neither a copy nor the possible filing of the complaint was communicated to the City of St. George. The Ministerial Alliance decided to watch developments and were rather "relieved" not to file. In December 1985, Huntsman submitted a bill to the Ministerial Alliance in the amount of $322.50 which covered drafting the complaint and other services. The ministerial plaintiffs never did advise the City of their intention to file or threaten the City with a lawsuit before filing the lawsuit which they actually did file on November 3, 1986.

17. On June 15, 1986, a change in the LDS Temple administration occurred at which time Thomas L. Esplin became the President of the LDS St. George Temple.

18. Shortly after Thomas L. Esplin was named President, he was contacted by Shumway to determine his attitude with respect to nighttime lighting of the LDS Temple. Shumway indicated that the City desired continuation of nighttime lighting. President Esplin indicated a willingness to light the Temple all night at the Temple's expense, contrary to the position of his predecessor, Don Russon, who would not light the Temple after 10:00 p.m. at night unless the City provided a

credit on the Temple electrical bill to cover partial costs. President Esplin referred City Attorney Shumway to the Director of Temple Operations at Salt Lake City to inquire as to the position of the LDS Church on the matter. He indicated that if the decision was his, however, the Temple would pay for the lighting.

19. On July 2, 1986, Shumway wrote to Derek Metcalf, the Managing Director of Operations of the Temple Department of the LDS Church in Salt Lake City, regarding the Temple lighting issue and stated in part:

> The St. George City Council would be pleased if the [LDS] Church were to light the temple all night, but given the policy to which I refer above, it [the City Council] is happy to allow a credit to cover the costs of lighting after 10:00 p.m.

In response, on September 4, 1986, Thor Leifson, a subordinate of Derek Metcalf, wrote to Shumway with a copy to President Esplin and advised that "the lights can be left fully illuminated or reduced, depending on community codes and customs or to accommodate the requests of local civic authorities."

20. On October 30, 1986, the St. George City Manager, Gary Esplin (a distant relative of President Esplin), conferred with the Mayor and two Council members at an unofficial "work" meeting of the Council. He communicated to them his intended decision to terminate the electrical credit in the best interests of the City. No one objected to that decision. City Manager Esplin previously had discussed his intended decision with another Council member and there was no objection. The City Attorney had advised Esplin that the decision to terminate would be regarded as an administrative decision within his power as a City Manager, and further that by reason of the September 4, 1986 letter from Salt Lake City, Temple President Esplin had been authorized to pay for nighttime Temple lighting should he so decide.

Gary Esplin knew, and the Mayor and City Councilmen had made it clear, that any decision by the City Manager as to such matters of substance, would be subject to approval by the City Council and could be countermanded.

21. On October 31, 1986, City Manager Gary Esplin decided to terminate the electrical subsidy Mr. Esplin testified that he regarded the Temple as an historical landmark and that lighting it at night was good for the City and wanted that to continue. His reasons for making the decision to terminate the electrical subsidy credit were (1) that it appeared to him that the Temple would continue to be lighted at night at the sole expense of the LDS Church without any contribution from the City; (2) that this would help to make a better feeling in the community and reduce tensions; and (3) that it would save costs and relieve him and others in terms of workload because fighting the lawsuit was taking a lot of time. The imminent lawsuit by the Ministerial plaintiffs did not motivate the decision and City Manager Esplin had no notice or knowledge that it was about to be filed. No written memorandum was made of the City Manager's decision and no public announcement was made of the decision.

22. On October 31, 1985, [sic] City Manager Esplin communicated his decision to terminate the electrical credit to City Attorney Shumway and asked him to advise the St. George City billing clerk to take appropriate action to terminate the electrical subsidy, effective November 1, 1986. Accordingly, Shumway instructed billing clerk Cori Pickering to terminate the credit on the next workday, November 3, 1986. On that date (November 3) she took the administrative steps to terminate the subsidy, and did so, without any knowledge of the Ministerial plaintiffs' lawsuit which was filed later the same day in Salt Lake City. Apparently because of the billing cycle, or for some other reason, termination of the subsidy actually was

made retroactive to October 2, 1986. Billing Clerk Cori Pickering had been advised previously in October that a decision to terminate the credit might be made.

23. On Monday, November 3, 1986, the Ministerial plaintiffs filed the present action in this Court seeking termination of both the electrical subsidy and the use of the logo/seal. As of that date none of the plaintiffs nor their counsel were aware of City Manager Gary Esplin's decision to terminate the credit/subsidy. Also, neither the defendant nor any of its representatives or counsel had any prior knowledge or had been given notice that the legal action of the Ministerial plaintiffs was about to be filed.

24. In the morning of November 4, 1986, before he had any knowledge or notice of the lawsuit filed the preceding day in Salt Lake City by the Ministerial plaintiffs, City Attorney Shumway met with Temple President Esplin, at which time he advised President Esplin of the determination and decision of the City Manager to terminate the electrical credit to the LDS Temple. Shumway requested reassurance that the Temple would continue to remain lit all night and indicated that if the LDS Church would not continue that practice at its expense the City likely would reconsider the decision to terminate the credit. Shumway told President Esplin that the reason for the decision of the City Manager to discontinue the credit included the continued devisiveness in the community, and the time and cost in litigating the Foremaster lawsuit. Shumway requested that the LDS Church assume the full financial responsibility for lighting the exterior of the Temple throughout the night. President Esplin said that he would still like to have personal confirmation from Salt Lake City that it would authorize him to exercise his discretion in paying for the nighttime Temple lighting. Shumway pointed out that the letter he had received dated September 4, 1986, with a copy to Temple President Esplin, already authorized

President Esplin to make the decision, but President Esplin persisted that he still wanted to talk to Salt Lake City before making an absolutely firm commitment.

25. Sometime after the meeting with President Esplin, on November 4, 1987, Shumway was contacted by the *Spectrum*, St. George's afternoon newspaper, about the filing of ~~the lawsuit~~ by the Ministerial plaintiffs. Shumway was quoted as being aware of the lawsuit, but made no mention of the electrical subsidy having been terminated. Temple President Esplin, Mayor Brooks and Council Members Sharon Isom, Douglas Nielson, Randy Wilkinson and Daniel McArthur all learned of the Ministerial plaintiffs' lawsuit by reading the evening edition of *The Spectrum*.

26. On November 5, 1986, President Esplin reached Derek Metcalf in Salt Lake City by telephone and received confirmation that the LDS Church would pay for the exterior nighttime lighting through the St. George Temple budget if that was the decision of President Esplin as the local responsible official. President Esplin called Shumway and informed him that the Temple would pay for the entire exterior nighttime lighting.

27. On November 6, 1986, at an executive session of the City Council of St. George, the City Manager's decision to terminate the electrical subsidy was discussed and the Council determined not to challenge that decision. Among the reasons discussed and given for confirming the City Manager's decision were:

(a) Temple President Esplin had agreed to pay the entire bill for the late night exterior lighting;

(b) Termination of the subsidy should end the turmoil, discord, divisiveness, and contention in the community;

(c) This would end the Foremaster litigation and get that case dismissed;

(d) This would avoid and end the Ministers' litigation;

(e) This would save money in defending the lawsuits and thereby save city taxpayer money; and

(f) This would serve the taxpayers' and community's best interests.

28. On November 13, 1986, at a public work meeting of the City Council of St. George, attended by the Mayor and all members of the City Council, the Council requested that notice of the termination of the credit be given to the newspaper in a press release to be prepared by the City Attorney, but only after the press release had been approved by each member of the Council.

29. On November 17, 1986, there was a hearing in this court in Salt Lake City before the Honorable David Sam on a motion to consolidate the two pending cases involving Foremaster and the Ministerial plaintiffs, and on November 20, 1986, the cases were ordered consolidated.

30. On November 26, 1986, motions to dismiss each of the pending complaints and other motions were mailed to the clerk of this court in Salt Lake City for filing. In the motion to dismiss applicable to Foremaster, it was asserted that as a non rate payer and non resident he lacked standing to sue; as to the Ministerial plaintiffs' suit it was set forth that termination of the electrical credit subsidy had become effective November 1, 1986, and that the case was moot.

31. On November 28, 1986, the City Council of St. George issued a news release in which it was set forth that the City of St. George had moved to dismiss the electrical subsidy portion of the lawsuit because a prior decision had been made to terminate the electrical credit, which news release accurately reflected the position of the members of the St. George City Council including the

Mayor. This was the first public notice given to anyone that the subsidy had been terminated.

32. On December 30, 1986, all pending motions were heard by this court, including plaintiff Foremaster's motion for summary judgment on temple lighting, the Ministerial plaintiffs' motion for summary judgment on temple lighting, plaintiff Foremaster's motion for partial summary judgment having to do with the logo matter, and the Ministerial plaintiffs' motion for partial summary judgment having to do with the logo matter. In addition, defendant's motion to dismiss Foremaster's complaint for lack of standing as to the Temple lighting issue, and defendant's motion to dismiss the Ministerial plaintiffs' complaint for mootness on the Temple lighting issue were heard.

33. On December 30, 1986, in open court, the court dismissed Foremaster's action as to the Temple lighting issue in that plaintiff Foremaster lacked standing to obtain jurisdiction of the court. The court also dismissed the Ministerial plaintiffs' complaint as to the Temple lighting issue for the reason that the complaint was moot since the electrical subsidy credit had been terminated as of the date of the hearing on December 30, 1986. Those rulings and decisions were memorialized in a written Order of this court dated February 2, 1987. The motions with respect to the logo issue were taken under advisement and later were denied for the reasons set forth in Memorandum Decision and Order issued by this court on February 24, 1987, 655 F. Supp. 745 (D. Utah 1987).

34. Foremaster was not an electrical ratepayer of the City of St. George, Utah, and was not affected financially by the electrical subsidy credit either before or after it was terminated by defendant.

35. Attorney Brian Barnard was engaged to represent Foremaster in December 1985. The arrangement for payment of legal fees between Foremaster and Barnard was

wholly contingent and entirely separate from and not a part of the later arrangement or understanding as to fees between attorney Barnard and the Ministerial plaintiffs.

36. Attorney Brian Barnard was engaged by the Ministerial plaintiffs to represent them in mid-October 1986. The arrangement for payment of legal fees between the Ministerial plaintiffs and attorney Barnard was wholly contingent, to be paid from moneys which might be awarded in the lawsuit filed on their behalf on November 3, 1986. There was no arrangement, understanding or obligation incurred by the Ministerial plaintiffs for any past services rendered as to the Foremaster lawsuit, contingent or otherwise.

37. The lawsuit by the Ministerial plaintiffs was not a substantial factor or a significant catalyst in causing termination of the electrical subsidy/credit.

CONCLUSIONS OF LAW

1. Foremaster was never a proper plaintiff and had no standing to raise the issue concerning the electrical subsidy. He was not benefited and received no vindication of a right by reason of termination of the electrical credit.

2. Foremaster was not a prevailing party in his lawsuit on the electrical subsidy issue.

3. The Ministerial plaintiffs' lawsuit was not a significant factor in causing defendant to terminate the electrical subsidy, and the Ministerial plaintiffs were not catalysts in prompting that result.

4. The Ministerial plaintiffs were not prevailing parties in their lawsuit on the electrical subsidy issue.

5. Neither Foremaster nor the Ministerial plaintiffs were prevailing parties on the issue involving the logo for the reasons set forth in this court's Memorandum

Decision and Order dated February 24, 1987, 655 F. Supp. 74 (D. Utah 1987).

6. Foremaster is entitled to no attorneys fees in connection with his suit under 42 U.S.C. § 1988.

7. The Ministerial plaintiffs are entitled to no attorneys fees in connection with their suit under 42 U.S.C. § 1988.

DATED: December 17, 1987.

/s/ J. Thomas Greene
J. THOMAS GREENE
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH—CENTRAL DIVISION

Civil No. C85-1181G

PHILLIP L. FOREMASTER, *et al.*,
Plaintiffs,

vs.

CITY OF ST. GEORGE,
Defendant.

WASHINGTON COUNTY MINISTERIAL ALLIANCE, *et al.*,
Plaintiffs,

vs.

CITY OF ST. GEORGE,
Defendant.

JUDGMENT

In furtherance of this court's orders dated February 2, 1987 and February 24, 1987, and the Findings of Fact, Conclusions of Law and Memorandum Decision and Order entered contemporaneously herewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the complaint and causes of action of Phillip Lang Foremaster be, and the same hereby are, dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint and causes of action of the Washington County Ministerial Alliance and the individual plaintiffs named therein be, and the same hereby are, dismissed with prejudice as to the logo/seal issue for the reasons set forth in this court's Memorandum Decision

and Order of February 24, 1987, 655 F.Sup. 745 (D. Utah 1987). The complaint and causes of action are also dismissed as to the Temple lighting subsidy issue, but with retention of jurisdiction in this court in the event that a credit or electrical subsidy may be reinstated or otherwise provided by defendant City of St. George to the LDS Church for lighting the LDS Temple at St. George, Utah, as set forth in this court's order of February 2, 1987.

This court awards no attorney fees or costs to any plaintiffs pursuant to 42 U.S.C. § 1988, for the reasons set forth in the contemporaneously issued Memorandum Decision and Order.

DATED: December 17, 1987.

s/ J. Thomas Greene
J. THOMAS GREENE
United States District Judge

COPIES TO:

12/18/87:

Brian M. Barnard, Esq.
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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH—CENTRAL DIVISION

Civil No. C85-1181G

PHILLIP L. FOREMASTER,

Plaintiff,

vs.

CITY OF ST. GEORGE,

Defendant.

WASHINGTON COUNTY MINISTERIAL ALLIANCE; an unincorporated association; Rev. PAUL S. KUZY, St. George Catholic Church; Rev. RHETT DURFEE, First Southern Baptist Church; Rev. LESTER WOLLARD, Radio Ministery; Rev. EMORY D. HUEY, First Southern Baptist Mission; Rev. ELMER LUTHER ROYER, Assembly of God Church; Rev. A.M. WHITE, Assoc. Pastor First Southern Baptist Church; Rev. ALEX WILKIE, Pastor, Community Baptist Church,

Plaintiffs,

vs.

CITY OF ST. GEORGE,

Defendant.

ORDER

Following the issuance of Findings of Fact and Conclusions of Law and Judgment in this case on Decem-

ber 21, 1987, pursuant to Rules 59 and 52, F.R.C.P., plaintiff Foremaster timely filed a Motion to Amend Findings and an Addendum to Motion to Amend Findings. On January 11, 1988, defendant filed its response.

Having reviewed the parties' memoranda the court finds no need for oral argument.

Plaintiff Foremaster's motion addressed the following Finding of Fact:

> 1. Plaintiff Phillip Lang Foremaster is and at all pertinent times was a resident of Quail Lake (part of Hurricane City) in Washington County, Utah.

The court having considered this matter and having reviewed the files and evidence which was presented, plaintiff's Motion is herewith granted nunc pro tunc in the following particular so that the former Finding is replaced and amended to read as follows:

> 1. Plaintiff Phillip Lang Foremaster is, and since approximately August 1987, was, a resident of Quail Lake (part of Hurricane City) in Washington County, Utah. From November 1985, when the complaint herein was first filed, to August 1987, plaintiff was a resident of the City of St. George, Washington County, Utah, but from and after November 1985, plaintiff was not a ratepayer of the electrical utility operated by the defendant City of St. George.

In all other respects, plaintiff's motion is denied. The revised Finding does not affect or change the court's ruling in any way, and in all other respects the Findings of Fact, Conclusions of Law and Judgment shall remain in full force and effect.

The hearing which was set in this matter for February 11, 1988, at 3:30 p.m. is vacated.

This is a final order and no further document need be prepared by counsel.

DATED: January 15, 1988.

/s/ J. Thomas Greene
J. THOMAS GREENE
United States District Judge

COPIES TO:

1/15/88; ln

Brian M. Barnard
T. W. Shumway
Steven E. Snow

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Civil No. 85-C-1181 G

PHILLIP L. FOREMASTER,
Plaintiff,

vs.

CITY OF ST. GEORGE,
Defendant.

WASHINGTON CO. MINISTERIAL ALLIANCE, *et al.*,
Plaintiffs,

vs.

CITY OF ST. GEORGE,
Defendant.

ORDER DISMISSING COMPLAINTS AS TO TEMPLE ILLUMINATION

MOTIONS IN THE ABOVE MATTER having come on before the Court for hearing on December 30, 1986, at the hours of 10:30 a.m., Plaintiffs PHILLIP L. FOREMASTER and WASHINGTON COUNTY MINISTERIAL ALLIANCE, et al., appearing through their attorney of record, Brian M. Barnard, Utah Legal Clinic, and the Defendant CITY OF ST. GEORGE, appearing through its attorney of record, T. W. Shumway, City Attorney, the Hon. Thomas Greene presiding, and the various memoranda and supporting pleadings having been reviewed and oral argument presented by the re-

spective counsel regarding (1) Plaintiff Foremaster's Motion for Partial Summary Judgment (temple lighting), (2) Ministerial Plaintiffs' Motion for Partial Summary Judgment (temple lighting), (3) Plaintiff Foremaster's Motion for Partial Summary Judgment (logo), (4) Ministerial Plaintiffs' Motion for Partial Summary Judgment (logo), Defendant's Second Motion to Dismiss Foremaster's Complaint in part for lack of standing (temple lighting), and Defendant's Motion to Dismiss Ministerial Plaintiffs' Complaint in part for mootness (temple lighting);

Based upon full consideration by the Court, and good cause appearing therefor, IT IS HEREBY ORDERED:

1. The second motion of the City of St. George to dismiss the Complaint of Plaintiff Foremaster as to the temple lighting issue is granted for the reason that said Plaintiff lacks standing to obtain the jurisdiction of this Court over the subject matter of that portion of the Complaint.

2. The motion of Defendant City of St. George to dismiss the Ministerial Plaintiffs' Complaint as to the temple lighting issue is granted for the reason that no valid issue existed as to the illumination of the temple in that the Complaint was filed as of the date of the Hearing on December 30, 1986.

3. Plaintiff Foremaster's Motion for Partial Summary Judgment as to the logo issue is submitted by counsel and taken under advisement.

4. The Ministerial Plaintiffs' Motion for Partial Summary Judgment as to the logo issue is submitted by counsel and taken under advisement.

5. The other pending motions are rendered moot by the above rulings of the Court.

IT IS FURTHER ORDERED that the Court retains jurisdiction of the matters dismissed herein for the pur-

pose of further hearing and determination upon the merits in the event the temple lighting issue shall hereafter again become a valid issue through a credit given by Defendant City of St. George to the LDS Church for lighting of the temple.

DONE IN OPEN COURT this 30th day of December, 1986.

Copies mailed to cnsl 2-2-87:km
Brian B. Barnard, Esq.
T. W. Shumway, Esq.

/s/ Thomas Greene
THOMAS GREENE
Judge
United States District Court

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing Order to Brian Barnard, Utah Legal Clinic, 214 E. Fifth So., Salt Lake City, Utah 84111, this 19th day of January, 1987.

/s/ [Illegible]
Secretary

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH—CENTRAL DIVISION

Civil No. 85-C-1181 G

PHILLIP L. FOREMASTER
Plaintiff,

vs.

CITY OF ST. GEORGE, a political subdivision of the State of Utah,
Defendant.

PLAINTIFF'S SECOND AFFIDAVIT

STATE OF UTAH)
) ss.
WASHINGTON COUNTY)

PHILLIP L. FOREMASTER, having been duly sworn upon oath deposes and states as follows:

PLAY ON WORDS

1. I am the plaintiff in the above captioned matter. In reading the defendant's statement of "disputed facts" regarding its terms describing the City's improper conduct, a quotation comes to mind: "What's in a name? That which we call a rose by any other name would smell as sweet." Wm Shakespeare, *Romeo and Juliet*, Act II, Scene 2, Line 43.

City Seal

2. Whether the City of St. George wants to call the offending emblem a "seal" or a "logo" or a "design" does

not matter. The facts are that the emblem was (a) officially adopted by the City Council, (b) as a symbol to identify the City, and (c) it has been officially used in several different prominent ways for many years to represent the City of St. George.

3. In that emblem, the improper alliance (officially created, adopted and sanctioned) between the City of St. George and the St. George LDS Temple exists no matter what the colorful round attention-getting artistic representation is called.

Electrical Subsidy

4. Whether the City wants to call the offending discount on the St. George LDS Temple's electrical bill a "subsidy" or a "gift" or a "credit" does *not* matter. The facts are that the benefit for the LDS Temple (a) was officially adopted by the City, (b) has been in effect for at least forty-four (44) years and (c) means that the rate payers of St. George must pay higher bills because the City is providing that "subsidy," "gift" or "credit" to the LDS St. George Temple.

5. With that "subsidy," "gift" or "credit," the improper financial assistance (officially created, adopted and sanctioned) by the City of St. George to the St. George LDS Temple exists, no matter what words are used.

ELECTRICAL SERVICE

6. For at least two (2+) years prior to April, 1985 I resided in a condominium located in St. George at 1021 So. Valley View Road, #49, St. George, Utah. At that residence and for that period of time, I had an account in my name for the electrical service with the municipal power system owned and operated by the City of St. George. I personally paid for the electrical service provided to me at that address.

7. Since April, 1985, I have not had a billing for electrical service from the City of St. George in my name, however, my personal residence is and has been provided electrical service by the municipal power system of the City of St. George.

8. From approximately April, 1985 until approximately June, 1986 I resided in a mobile home at 175 N. 600 East, # 21, St. George, Utah. Electricity for that mobile home space is provided by the Utility Department of the City of St. George. I paid for that electrical service for my mobile home as part of my monthly space rental payment, although that electrical service was not in my name.

9. I am currently a rate payer and a user of electrical service provided by the Utility Department of the City of St. George in that:

(a) I lease office space in the City of St. George for my practice of law; that office is located at 165 No. 100 East, # 1, St. George, Utah. I leased that office at the time this suit was filed and have continuously done so since that date. Electricity for that office space is provided by the Utility Department of the City of St. George. I pay for that electrical service for my office as part of my monthly lease payment, although that electrical service is not in my name.

(b) I currently reside in an apartment in the City of St. George; I have resided there since approximately June, 1986. The address is 400 East Riverside, St. George, Utah. Electricity for that apartment is provided by the Utility Department of the City of St. George. Since that date, the account for that electrical service has been in the name of the person with whom I reside. Although that service has not been in my name, I am and have been responsible for and have paid one-half of that bill each month. As of the week of October 27, 1986, that electrical service account was transferred to my name.

(c) In addition, I have an account with the Utility Department of the City of St. George for the provision of water to my home located at 240 Sugar Leo Road, St. George, Utah.

SUBSIDY'S AFFECT and INTERFERENCE

10. I have lived in the City of St. George and the St. George area for all of my life. I am now and have been throughout the years of 1985 and 1986 a citizen, voter, ratepayer, resident and taxpayer of and in the City of St. George.

11. I am greatly offended by the official direct financial support of the LDS Temple by the City of St. George; that is a strong and direct interference with my rights as a citizen. That Temple is the predominant man-made structure in the St. George area; to Mormons and non-Mormons that Temple represents the basic tenets of the LDS faith. The visual impact of seeing that lighted Temple late at night and the fact that that Temple is thus lighted by the City of St. George with rate payer and City money greatly offends, intimidates and affects me.

CITY SEAL'S AFFECT and INTERFERENCE

12. Whether or not I have an electrical account in my name, I am greatly offended by the support of the LDS Temple by the City of St. George in using a representation of that Temple in an officially adopted City seal; that is a strong and direct interference with my rights as a citizen. The visual impact of seeing that Temple on a daily basis as part of an official emblem of the City on official vehicles, on City stationary, on the City flag, on plaques at the City Hall, etc. has and continues to greatly offend, intimidate and affect me.

AFFECT and INTERFERENCE

13. By the conduct of the City as to the electrical subsidy and the use of the City seal, I feel that I am

being subjected to an unwelcome religious exercise through the city government and the municipal power company. My personal beliefs about religion, my spiritual values and beliefs have been and are being infringed by the City's misconduct. My rights and values based upon the first amendment of the United States Constitution as well as my concerns about separation of church and state caused me to bring this lawsuit and to seek an end to the City's mis-conduct.

Dated this —— day of NOVEMBER, 1986.

/s/ Phillip L. Foremaster
PHILLIP L. FOREMASTER
Plaintiff

SUBSCRIBED AND SWORN TO ME ON THE DATE ABOVE WRITTEN.

My comm. expires:

_____

_____

Notary Public
Residing at Washington County
UTAH

MAILING CERTIFICATE

I hereby certify that on the —— day of OCTOBER, 1986, I caused to be mailed a copy of the above and foregoing AFFIDAVIT OF PLAINTIFF (SECOND) to:

Theodore W. Shumway, City Attorney
ST. GEORGE CITY HALL
175 East 200 North
St. George, Utah 84770

counsel for the opposing party, postage prepaid in the United States Postal Service.

/s/ Brian M. Barnard
Attorney for Plaintiff

APPENDIX 1

(2)

No. 89-1197

In The

Supreme Court of the United States

October Term, 1989

CITY OF ST. GEORGE, UTAH,

Petitioner,

v.

PHILLIP L. FOREMASTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIAN M. BARNARD
UTAH CIVIL RIGHTS &
LIBERTIES FOUNDATION, INC.
214 East Fifth South Street
Salt Lake City, Utah
84111-3204
Phone: (801) 328-9532

Counsel for Respondent
&
Counsel of Record

April 2, 1990.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should this Court grant a Writ of Certiorari where the issues raised below have been rendered moot by the actions of the Petitioner and by a third party?

2. Should this Court grant a Writ of Certiorari where the remaining factual issue is not ripe for decision?

3. Should this Court grant a Writ of Certiorari to examine whether a resident and citizen has standing to challenge the pervasive use of a City logo depicting the religious building of one religion?

4. Should this Court grant a Writ of Certiorari to examine whether a resident, ratepayer and taxpayer has standing to challenge an electrical subsidy given to one church through municipal power system?

5. Should this Court grant a Writ of Certiorari to examine whether a City violated the Establishment Clause by providing a Church free electricity to the exclusion of all other private organizations, secular and non-secular?

6. Should this Court grant a Writ of Certiorari to examine whether the Tenth Circuit properly remanded a part of this case in order to receive more evidence on whether a City logo violated the Establishment Clause?

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No. 89-1197

In The

Supreme Court of the United States

October Term, 1989

CITY OF ST. GEORGE, UTAH,

Petitioner,

v.

PHILLIP L. FOREMASTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent Phillip L. Foremaster, ("Foremaster"), submits the following Brief in Opposition to the Petition for a Writ of Certiorari filed by the City of St. George, Utah ("City of St. George").

STATEMENT OF THE CASE

A. Background.

Respondent, Phillip L. Foremaster was a resident, a taxpayer, an electrical ratepayer and a voter in the City of St. George. When he filed this action, Foremaster resided

in St. George, and paid for one-half (1/2) of the electrical service to his residence (Petition for a Writ of Certiorari [hereinafter, Petition], p. 5a; Response to Plaintiff's Second Request for Admissions [hereinafter, City's Admissions], ¶ 5).

Petitioner, the City of St. George (the City), operates its own municipal electrical system (City's Admissions, ¶ 12).

The Church of Jesus Christ of Latter-day Saints (hereinafter sometimes the Mormon Church or Mormon) is an unincorporated association organized for purposes of conducting a religion. That Church owns a religious building in the City, known herein as the Temple, which is used exclusively for activities held sacred by the Mormons (Petition, pp. 20a-23a (and notes therein)). The general public may not enter the Temple. In fact, only those select members of the Mormon Church who have met Church established standards of "worthiness" may enter the Temple (*Id.* at 22a).

The Mormon Church actively seeks converts through advertising, missionaries and proselytizing. The Temple and its Visitor's Center are advertising and proselytizing tools of the Mormon Church. In 1985, more than one-quarter million people visited the Visitor's Center (Defendant's Answers to Second Set of Interrogatories [hereinafter, City's Second Answers], ¶ 48; *see also* Petition, p. 23a).

All Mormon temples are prominent and highly visible, through illumination at night and by their location. They tend to be strikingly and dramatically designed. The St. George Temple sits on a knoll and is the predominant man-made structure of the area. The pure white

stucco exterior sets the St. George Temple apart from the surrounding natural red sand and stone (Petition, p. 3; Memorandum Re: Significance of Temples of the Church of Jesus Christ of Latter-day Saints [hereinafter, Memo Re: Temples]).

Mormon temples are described by Church leaders as "beacons" and "ensigns" for this mortal world, to aid members and non-members alike (Memo Re: Temples). A Mormon temple has great and significant symbolic meaning to Church members (and non-members). Symbolically, a cross is to Christianity as a Mormon temple is to the Mormon Church. A cross and a Mormon temple each symbolize the core, main tenets, basic thought and essence of those two religious groups (*see* Petition, pp. 20a-23a; Memo Re: Temples). A Mormon temple constitutes a physical manifestation and symbol of that Church and is clearly and exclusively religious in character (City's Admissions, ¶ 26).

B. The Electrical Subsidy.

In 1942, the City began crediting the Mormon Temple's electric bill, subsidizing the late-night illumination of the Temple at City expense. The City's gift of electricity was as high as one hundred eighty dollars ($180.00) per month (Petition, p. 3). The subsidy was discontinued in 1986, after Foremaster filed this action, because the St. George Temple President declared that the Church was willing to assume the cost of the late-night illumination of the Temple (Petition, pp. 46a, 48a). Three persons who were members of the St. George City Council when they were deposed in 1987, indicated that they might resume

the electrical subsidy in the future, "if the Mormon Church were to change its policy (of paying for the electricity it uses to illuminate the Temple)." (Petition, pp. 3-4 n.3). At least one of the persons deposed is no longer a member of the City Council.[1]

Petitioners declare that the gifts of electricity were initiated to promote tourism (Petition, p. 3 n.3).[2] Significantly, the City has never provided free electricity to any other privately owned tourist attraction (City's Second Answers; City's Admissions).

The Tenth Circuit Court of Appeals held that the forty-four (44) years of free electricity to the Temple economically harmed Foremaster, and all other City taxpayers and ratepayers (Petition, p. 5a & n.3). The City admits that the electricity gifts reduced the City's revenues (Petition, p. 15 n.9). In fact, the City concedes that the electricity give-away resulted in the expenditure of a substantial amount of public funds (City's Admissions ¶ 22(a)).

Foremaster also suffered non-economic loss. He could not avoid seeing the illuminated Temple because it is the "predominant man-made structure of the entire city and area." (Petition, p. 3). Significantly, the City admits that illuminating the Temple "may indirectly serve to arouse curiosity on the part of non-members of the Church of Jesus Christ of Latter-day Saints." (Defendant's

---

[1] More importantly, the former declarations by council members, past or current, concerning possible council decisions about uncertain events cannot dictate future City policy.

[2] There is no record of the City Council meeting in 1942 when the City authorized the gifts.

Amended Answers to First Set of Interrogatories [hereinafter, City's Amended Answers], ¶ 42(e)).

The unavoidable sight of the taxpayer-lighted Temple (along with the unavoidable contact with the City logo, *infra*), subjected Foremaster "to an unwelcome religious exercise through [the actions of] the city government and the municipal power company." (Petition, pp. 66a-67a). Short of moving his residence and his business to another city, Foremaster could not avoid the unwelcome religious exercise.

The City no longer gives free electricity to the Mormon Temple. Therefore, the controversy surrounding the subsidy has ended.

C. The City Logo.

The City of St. George formerly used a logo to identify the City. The logo served "as a 'descriptive, colorful, attraction-getting' symbol to advertise the St. George area." (Petition, p. 4). The only structure depicted on the logo was the St. George Temple (Petition, p. 69a (a non-colored duplicate of the logo)).

When this suit was filed, the logo was displayed on (a) eighty or ninety city vehicles (approximately two-thirds (2/3) of the non-emergency, non-police vehicles), (b) a wall plaque in the main foyer of the St. George City Hall, (c) on two (2) directional signs near the City Hall parking lot, and (d) on a flag in the City Council chambers. Additionally, before 1981, the logo was displayed on City stationery. (Petition, p. 19a).

Currently, however, the logo is displayed on only the two (2) directional signs and on the single wall plaque at City Hall. (*Id*). As with the electrical subsidy, the controversy surrounding the logo has ended. Additionally, the question of whether the logo violated the Establishment Clause is currently before the District Court, on remand (Petition, p. 14a).

Foremaster suffered non-economic injury from his unavoidable exposure to the City logo that advertised the Temple – a symbol of unquestioned religious significance (*see* Petition, pp. 20a-23a, discussed *supra*). In 1986, before the City terminated the electrical subsidy and its pervasive use of the logo, Foremaster declared:

> The visual impact of seeing that Temple on a daily basis as part of an official emblem of the City on official vehicles, on City stationery, on the City flag, on plaques at the City Hall, etc., has and continues to greatly offend, intimidate and affect me. . . . By the conduct of the City as to the electrical subsidy and the use of the City seal, I feel that I am being subjected to an unwelcome religious exercise. . . .

Petition, pp. 66a-67a. Again, the only way Foremaster could have avoided the unwelcome religious exercise embodied by logo, was to have moved his residence and his business to another city.

SUMMARY OF REASONS FOR DENYING THE WRIT

I. The issues presented below are now moot. The electrical subsidy was terminated in 1986. The City's pervasive use of the offensive logo has also ended.

II. The issue of the City logo is not ripe for review. The Tenth Circuit remanded the case to hear evidence as to the primary effect that the picture of the Church Temple might have on the casual observer. The lower court decision may obviate all need for review. Refusing certiorari at this point will not prejudice the Petitioner's future rights to appeal.

III. The Respondent had standing to challenge the pervasive use of a City logo based on the non-economic injury he suffered. An unwelcome religious message was embodied in the City logo. The Respondent was unable to avoid the City's religious message without moving to another city.

IV. The Respondent had standing to challenge the City's gift of electricity to a single Church. First, the respondent suffered economic injury. Because the gift drained municipal resources, the Respondent, along with all nonbeneficiary taxpayers and ratepayers, bore the burden of compensating for the City's gifts to the single Church. Second, as a taxpayer and a ratepayer, the Respondent has "taxpayer standing" to challenge the City Council's spending that violated the Establishment Clause. Third, because the Respondent was forced to endure the religious exercise embodied by the City sponsored illumination of the single Church – with no ability to avoid it unless he moved to another city – the Respondent suffered non-economic injury sufficient to confer standing.

V. The City sponsored illumination of a single Church, violated the Establishment Clause. First, because the City gave electricity to only one Church, and to no

other tourist attractions, the policy behind the gifts could not have a secular purpose. Second, the policy of giving electricity to a single Church endorsed and promoted a single religion, to the exclusion of all other beliefs. Nothing, such as the illumination of any other privately owned buildings, served to dilute the City's apparent endorsement of the single religious belief. Therefore, the primary effect of the electricity gifts was to endorse one religion. Finally, City monitoring of the interaction between the Church officials and the tourists drawn by the City sponsored illumination would have hopelessly entangled City and Church affairs.

VI. The Tenth Circuit did not err in remanding the issue of the City logo to the District Court. Where an appellate court must decide whether a governmental practice, *as applied*, has the primary effect of advancing a religious belief, the issue is more that a mere question of law. Therefore, the Tenth Circuit properly remanded the case to resolve the question of what effect the logo had on the casual observer.

REASONS FOR DENYING THE WRIT

I. THE ISSUES RAISED ARE MOOT.

Article III, section 2 of the Constitution deprives this court of subject matter jurisdiction over cases lacking live controversy. *See e.g., St. Pierre v. U.S.*, 319 U.S. 41, 42 (1943)("a federal court is without power to decide moot questions or to have advisory opinions which cannot affect the rights of the litigants in the case before it.") *overruled on other grounds, Pennsylvania v. Mimms*, 434 U.S.

106. Because the City has stopped providing free electricity to the Church, and because the City has ceased its pervasive display of the City logo, the issues of this case are moot. Hence, this Court does not have jurisdiction to hear the appeal.

A. The Electricity Subsidy.

The issue of the electricity subsidy is moot because a third person's actions caused the termination of the subsidy. *See Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983). In *Iron Arrow*, an all-male student organization filed suit to prevent enforcement of an anti-discrimination statute banning all-male organizations from private schools. While on appeal, the private school declared that it would ban the organization whether or not the ban was mandated by the statute. The unilateral action of the school mooted the issue of the statute's enforcement. Consequently, this Court remanded to the lower court with an order to dismiss because the issue was moot. *Id.*

An otherwise moot issue will not confer jurisdiction on a court simply because there is a possibility the issue may arise some time in the future. In other words, "[a] hypothetical threat is not enough." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).

The issue regarding the lighting of the Mormon Temple is moot. Just as in *Iron Arrow, supra*, a third party has defused the issue. On November 5, 1986, the President of the St. George Temple told the City that the Temple would henceforth pay for lighting the Temple at night. The following day, the St. George City Council acquiesced

in a decision by the City Manager to terminate the electricity subsidy, because (1) the Temple President had offered to pay for all electricity received, and (2) the council hoped to end the *Foremaster* litigation by terminating the subsidy. Petition, p. 24a. For over three years, the City has not given free electricity to the Mormon Church. Consequently, there is no live issue regarding the electricity subsidy over which this Court may exercise jurisdiction.

Three members of the St. George City Council, however, asserted in 1987 that the City might resume the electricity subsidy to the Temple in the future. Petition, pp. 3-4 n. 3. The vague threats of future council action concerning uncertain events made by council members who, if and when the events actually occur may no longer even be members, cannot dictate future City policy. The "hypothetical threat" from past or present Council members does not meet Article III requirements for a live controversy.

The electricity subsidy issue is a moot issue. The City does not currently give the church free electricity, nor are there plans to do so. Therefore, this Court should not grant a Writ of Certiorari to hear the subsidy issue.

B. The City Logo.

The City logo is also a moot issue. At the time this action was filed, the logo was pervasively displayed. The logo had been on city stationery and envelopes. It was on between eighty and ninety city vehicles – approximately two/thirds (2/3) of the city vehicles excluding police and emergency vehicles. The logo was on a historical plaque and two parking lot signs at the City Hall, and on a flag

in the City Council chambers. Petition, p. 19a. Today, the City logo remains on the historical plaque, and on the two directional signs in a City parking lot, only. *Id.*

The use of the offending logo is no longer pervasive. Thus, Foremaster no longer suffers daily injury by being unavoidably forced to either accept its unwelcome religious message, or bear a special burden to avoid it (*see* discussion of standing and non-economic injury, *infra*, Section III). The issue of the City logo is moot. Therefore, the Court is without jurisdiction to adjudicate the issue.

II. ISSUES REGARDING THE EFFECT OF THE LOGO ARE NOT RIPE FOR REVIEW BY THIS COURT.

It is inefficient and inappropriate for the Court to rule on the logo issue until the trial court has made a decision as to the logo's primary effect. *See* Petition, pp. 13a-14a. "Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Sup. Ct. R. 17.1. Due to the finite institutional capacity to accept cases and the policy not to review issues unless necessary, this Court imposes sharp limits on certiorari discretion. Wright, Miller and Cooper, *Federal Practice Procedure* (1988) §4004, p.508; *see e.g., Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1950).

In determining whether to grant certiorari, the Court must consider "the appropriateness of the issues for decision and the actual hardship to the litigants" if certiorari is denied. *Poe v. Ullman*, 367 U.S. 497, 509 (1961); *Joint Anti-Fascist Refugee Committee v. McGrath, supra.* For

example, the Court may defer ruling on an issue until some judicial or legislative event occurs that may affect the appropriateness of review or provide a better prospective for decision. R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice (6th ed. 1986) at 377. In fact, on occasions the Court has decided to withdraw grants of Writs of Certiorari because subsequent judicial or legislative action made the grants improvident. *See Cook Zv. Hudson*, 429 U.S. 165 (1976); *Picirillo v. New York*, 400 U.S. 548 (1971); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971)(opinion of Justice Harlan); *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955).

In the instant case, the Tenth Circuit remanded to determine whether the City's pervasive use of the logo violated the Establishment Clause. Petition, pp. 13a-14a. The District Court has not yet ruled. If the District Court does not find an Establishment Clause violation, then every issue ancillary to the logo issue will be moot. If the District Court finds an Establishment Clause violation, however, then every avenue of appeal will still remain open – petitioner will suffer no prejudice if this Court denies the Petition for a Writ of Certiorari at this time. Therefore, in the interest of judicial economy, this Court should not hear the logo issue before the lower court renders a judgment.

III. THE COURT OF APPEALS PROPERLY FOUND THAT A CITIZEN AND RESIDENT HAD STANDING TO CHALLENGE USE OF A CITY LOGO CONTAINING A PICTURE OF A MORMON TEMPLE.

Both the U.S. District Court and the Tenth Circuit Court of Appeals correctly found that Foremaster had

standing to challenge the City's logo because Foremaster had suffered non-economic injury. Further, there is no conflict between the Circuits over the definition of non-economic injury in a case such as this.

Standing requires that certain constitutional and prudential conditions be met. *See e.g., Valley Forge College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472, 474-475 (1982)(hereinafter *Valley Forge*). The key issue in this case, as well as those discussed below, is whether the plaintiff has suffered a sufficient non-economic injury.

In *Valley Forge* the Court declared that a "spiritual stake" in the outcome of the litigation was not an injury sufficient to confer standing to the plaintiff. *Id.* 454 U.S. at 486-487, n. 22. In an oft-quoted passage from *Valley Forge,* 454 U.S. at 486-487, n. 22, this Court explained and reaffirmed the basis for the plaintiffs' standing in *Abington School Dist. v. Schempp,* 374 U.S. 203 (1963). The Court explained that in *Abington School Dist.,* the plaintiff children and their parents had standing to challenge optional prayer in public school, "not because their complaint rested on the Establishment Clause . . . but because impressionable school children were subjected to unwelcome religious exercises *or* were forced to assume special burdens to avoid them." *Valley Forge,* at 486-487, n. 22 (emphasis added).

The Tenth Circuit, in *Foremaster,* found "particularly persuasive" the reasoning in *Hawley v. City of Cleveland,* 773 F.2d 736 (6th Cir. 1985) *cert. denied,* 475 U.S. 1047 (1986). Petition, p. 10a. In *Hawley,* the plaintiffs challenged the placement of a chapel in the city airport. From

the outside of the chapel, the only indications of religious exercise would be a simple sign and perhaps some stained glass windows. *Id.*, at 737. The plaintiffs could have gone out of their way to avoid passing the chapel. The court found that plaintiffs had standing because they were forced to " 'assume special burdens' to 'avoid unwelcome religious exercises.' " *Id.*, at 740 (*quoting Valley Forge*, at 486-487, n. 22).

In the immediate case, Foremaster had direct and personal contact with the City's logo and its depiction of the Mormon Temple. Petition, p. 11a. Foremaster's contact was unavoidable because the City used the logo on most City cars, on a plaque, on a flag, on stationery, and on various signs. Petition, p. 19a.

Foremaster was forced to either subject himself to an unwelcome religious exercise, or assume a special, and perhaps impossible burden to avoid them. *See* Petition, pp. 66a-67a (*quoted* in Statement of the Case). Foremaster suffered injuries that are nearly indistinguishable from the non-economic injuries suffered by plaintiffs in *Abington School Dist.* and in *Hawley*. Therefore, Foremaster had standing.

Petitioner asserts that there is a difference in interpretation of *Valley Forge, supra*, by the Sixth, Tenth, and Eleventh Circuits, as opposed to the Seventh Circuit's interpretation. Petition, p. 10; *see also Id.*, at 10a. This Court has clearly explained that where the plaintiff *either* personally and actually faces unwelcome religious exercises, *or* must assume a special burden to avoid them, the plaintiff has standing. *Valley Forge*, 454 U.S. at 486-487, n. 22 (*citing Abington School Dist., supra*). That recipe for

standing harmonizes each case cited by Petitioner and shows no conflict between the Circuits.

For example, in one Seventh Circuit case, *ACLU v. City of St. Charles*, 794 F.2d 265 (1986) *cert. denied*, 479 U.S. 961 (1986), plaintiffs were faced with either traveling their customary routes and facing an unwelcome cross displayed on public property, or changing their routes, thereby assuming a special burden. The court found plaintiffs had standing. *Id.* at 268-269 (*citing Abington School Dist.*, and *Valley Forge, supra*). *See also Freedom From Religion Foundation v. Zielke*, 845 F.2d 1463 (7th Cir.1988)(no standing for plaintiffs who were neither regularly exposed to a religious monument in a city park, nor burdened in order to avoid it).

In the Eleventh Circuit case of *Saladin v. City of Milledgeville*, 812 F.2d 687 (1987) the court found standing where plaintiffs were regularly and unavoidably exposed to a city seal that expressly promoted Christianity. The only plausible means by which plaintiffs could have avoided exposure to the seal would have been moving from their home – a special burden, indeed. *See also Hawley v. City of Cleveland, supra* (plaintiffs suffered injury and had standing when faced with either exposure to an airport chapel or altering their normal routes to avoid it); *ACLU v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983)(two plaintiffs suffered injury and had standing when forced to either tolerate a brightly lighted cross at a state camping area, or assume the burden of not camping at the public area; alternatively, one plaintiff whose summer cabin faced the lighted cross was forced to either accept the unwelcome religious exercise, or assume the special

burden of moving, therefore he suffered injury and had standing).

Every plaintiff in each case discussed above faced the same "either or" choice. In the case at bar, Foremaster was faced with either constantly encountering the unwelcome logo, or assuming the special and nearly impossible burden of avoiding it. There is no conflict between the Circuits, and there is no doubt of Foremaster's injury from the City logo.

IV. THE COURT OF APPEALS PROPERLY FOUND THAT A RATEPAYER AND TAXPAYER HAD STANDING TO CHALLENGE A SUBSIDY BY A MUNICIPAL UTILITY BENEFITING ONE CHURCH.

The respondent, Foremaster, had standing to challenge the City's gift of electricity to one church as a violation of the Establishment Clause. Foremaster's standing rested upon at least three grounds.

First, as the Tenth Circuit correctly found, Foremaster suffered economic injury. Petition, p. 5a. In *Texas Monthly v. Bullock*, 489 U.S. ___, 103 L.Ed.2d 1, 109 S.Ct. 890 (1989), a Texas statute granted a sales tax exemption to publications that were strictly religious in nature. The exemption did not extend to any secular publications. The plaintiff challenging the exemptions was a general interest magazine not benefited by the exemptions. The Court held that the plaintiff had standing by virtue of the tax it had paid at the same time the religious publications were paying

nothing. The Court also stated that "[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious donors." *Id.* 103 L.Ed.2d at 13 (quotes and cites omitted).

In the case at bar, Foremaster was a utility ratepayer and a taxpayer. Petition, p. 5a. The gift of electricity to one church for forty-four (44) years, simply put, benefited the church, and drained finite municipal resources. Unquestionably, the years of free electricity resulted in either higher utility rates or higher municipal taxes. The City concedes that the electrical subsidy diminished municipal assets. *See* Petition, p. 15, n. 9 (the gift of electricity "reduce[d] the return to the shareholder, the City."). The subsidy to the church forced Foremaster to become a donor to the extent necessary to offset the subsidy. Consequently, as a ratepayer or a taxpayer, Foremaster suffered economic harm. That harm ceased when the City halted the electricity give-away. Foremaster had standing by virtue of his redressable economic injury.

Second, Foremaster had taxpayer standing. This Court, in *Flast v. Cohen*, 392 U.S. 83 (1968), recognized a special exception to the general rule against taxpayer standing. Essentially, where the taxpayer claims a violation of the Establishment Clause has occurred through an expenditure of tax funds, the taxpayer has standing. *Flast v. Cohen, supra, see also Grand Rapids School District v. Ball,* 473 U.S. 373, 380, n.5 (1985)(citing "numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools).[3] Petition, pp. 14-17. In *Marsh v. Chambers,*

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[3] *See Bowen v. Kendrick,* ___ U.S. ___, 101 L.Ed.2d 520, 108 S.Ct. 2562, 2579 (1988) (the Court has "consistently" adhered to

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463 U.S. 783 (1983), for example, the Court declared that a state taxpayer who challenged the expenditure of state taxes to fund a legislative chaplaincy had standing to assert a claim of Establishment Clause violation. *Id.* 463 U.S. at 786, n. 4.[4]

As a ratepayer and a taxpayer (Petition, p. 5a), Foremaster has challenged as violative of the Establishment Clause, the St. George City Council's 1942 decision to provide free electricity to a single church. Thus, he had standing.

Third, Foremaster has suffered a non-economic injury identical to his injury caused by the pervasive use of the City logo. Every night, Foremaster was forced to either endure the unwelcome religious exercise of seeing the Temple illuminated at taxpayer expense, or bear a special and perhaps impossible burden to avoid it. Petition, pp. 66a-67a. *See* Section III, *supra* (discussing the "either or" test to establish standing to challenge Establishment Clause violations). The St. George Mormon Temple is the predominate man-made feature of the City and can be seen from almost every location in town. At night, a person cannot avoid seeing the lighted Temple. The City's illumination of the Temple caused Foremaster non-

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Flast and the narrow exception it created to the general rule against taxpayer standing").

[4] In asserting that Mr. Foremaster lacked taxpayer standing, petitioner does not cite one case that involves an alleged violation of the Establishment Clause resulting from governmental spending.

economic injury. Therefore, he had standing to challenge the City's gift of electricity.

V. THE COURT OF APPEALS PROPERLY FOUND THAT A MUNICIPALITY VIOLATES THE ESTABLISHMENT CLAUSE WHEN IT GRANTS A SUBSIDY TO A CHURCH WITH THE PRIMARY EFFECT OF ENDORSING AND BENEFITING THAT RELIGION TO THE EXCLUSION OF ALL OTHERS.

The Court of Appeals for the Tenth Circuit correctly found that the City's provision of free electricity to one church, to the exclusion of all other secular and nonsecular organizations, violated the Establishment Clause. Petition, p. 8a. Gifts of electricity to the Mormon Temple would comport with the Establishment Clause only if the gifts have a secular purpose, the gifts neither advance nor inhibit religion in their primary effect, and the gifts do not foster excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

A. *Secular Purpose.* As to the secular purpose requirement, "the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Texas Monthly v. Bullock*, 103 L.Ed.2d at 14 (*quoting Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 696 (1970)). In other words, where a governmental policy has a secular purpose that incidentally benefits a nonsecular group or groups, along with other groups that promote the secular

purpose, the policy may stand. *Texas Monthly v. Bullock*, 103 L.Ed.2d at 10.[5]

Where, however, a governmental policy (1) benefits nonsecular interests, (2) substantially burdens nonbeneficiaries, and (3) is not mandated by the Free Exercise Clause, the policy is especially suspect. In *Texas Monthly v. Bullock, supra*, the tax exemptions benefited only religious publications. The selective tax exemption substantially burdened all nonbeneficiaries by increasing their tax bills by whatever amount was needed to offset the exemptions. The tax exemption was not mandated by the Free Exercise Clause. *See Texas Monthly v. Bullock*, 103 L.Ed.2d at 15-16, n. 8. The Court invalidated the tax exemption.

In the case at bar, the City of St. George gave free electricity to only one church. The purported secular purpose was to promote tourism – although the City is unable to produce any records from the 1942 City Council meeting where the subsidy was originally granted. No other organizations that promoted tourism received free electricity. At the same time, the ongoing gift of city resources to the single church clearly increased the burden shouldered by both the secular and nonsecular non-

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[5] *See e.g., Mueller v. Allen*, 463 U.S. 388 (1983) (upholding tax deduction where the purpose was to ensure an educated citizenry, and the deduction benefited families with children in secular private schools and families with children in nonsecular private schools); *Walz v. Tax Comm'n of N.Y.C., supra* (upholding property tax deduction where the secular purpose was to foster the "moral or mental improvement" of society, and the deduction benefited both secular and nonsecular groups that promoted that purpose).

beneficiaries. Petition, p. 5a. With reasoning that exactly parallels this Court's reasoning in *Texas Monthly v. Bullock, supra,* the Tenth Circuit found that the benefit conferred upon the Mormon Church was not necessitated by the Free Exercise Clause. Consequently, the Tenth Circuit Court of Appeals correctly invalidated the electricity give-away. Petition, 8a.

B. *Primary Effect.* The "primary effect" leg of the *Lemon* test under the Establishment Clause, prohibits a government from even "appearing" to endorse, favor, or promote a particular religious belief. *Allegheny County v. Greater Pittsburgh ACLU,* ___ U.S. ___, 106 L.Ed.2d 472, 109 S.Ct. 3086, 3101 (1989). To determine whether a governmental practice impermissibly endorses a religious belief, the first consideration is whether the practice communicates a religious message. The second consideration is whether the effect of the message is somehow diluted by the setting in which the message is delivered. *Id.,* at 3103 (where a creche is prominently displayed alone, the government's endorsement of Christianity is not diluted).

In the case at bar, the government sponsored illumination of the St. George Mormon Temple conveyed a religious message. The religious significance of Mormon temples is great and undisputed. Non-Mormons who visit temples grounds may enter only the visitor centers that are located nearby.[6] The visitor centers advertise and proselyte for the Mormon religion. Petition, pp. 20a-23a.

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[6] Mormon temples are "places of revelation." Mormon temples are used for the most significant and sacred rites of the

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The message sent by government sponsored illumination of the St. George Temple is no less potent than the message sent by a government choosing to illuminate a huge cross, Star of David, Buddha figure or statue of Siva. The message is that the sponsoring government endorses a particular religious belief.

Nothing serves to soften or dilute the message of religious endorsement in this case. The City does not sponsor the illumination of any other privately owned tourist attractions. Indeed, the message is amplified because the only building which tourists may enter is a center for advertising the Mormon religion.

The City's illumination of the Temple sends a message that the city endorses a particular church. The message is not diluted by anything else present in the setting in which the message is delivered. Hence, the gift of electricity to illuminate the Temple violated the Establishment Clause because the primary effect was to endorse a single religious sect.

C. *Entanglement.* Entanglement of church and state is restricted by the Establishment Clause to prevent, "as far as possible, the intrusion of either into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. at 614.

In the case at bar, the government sponsored illumination of the Temple, from 10 p.m. until dawn, was

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Mormon church. Once dedicated for use, the Mormon temple interiors are closed not only to non-Mormons, but also to Mormons who do not meet certain standards of "worthiness." Petition, pp. 20a-23a.

purportedly to attract more tourists into the City.[7] Presumably, some tourists visited the Temple grounds after seeing the "Temple's aesthetic values" highlighted by the nightly illumination. Petition, p. 3. For City officials to ensure that visitors were not subjected to nonsecular influence while on Temple grounds would require an absurd level of monitoring and consequent impermissible entanglement.

VI. THE COURT OF APPEALS PROPERLY REMANDED THIS CASE TO HEAR EVIDENCE CONCERNING THE "PRIMARY EFFECT" UPON A CASUAL OBSERVER OF THE CITY LOGO DEPICTING THE MORMON TEMPLE.

The Tenth Circuit did not err in remanding this case so the District Court could hear evidence on whether the City logo violated the "primary effect" leg of the *Lemon* test. This Court recently followed an identical track. *Bowen v. Kendrick*, ___ U.S. ___, 101 L.Ed.2d 520, 108 S.Ct. 2562 (1988).

In *Bowen v. Kendrick, supra*, the Court distinguished "facial" Establishment Clause violations from "as applied" violations. While the distinction had rarely been made before, the Court noted that there had been evaluation of Establishment Clause claims that were clearly facial in nature: the government practice was evaluated without any evidence of how the practice had actually been applied. *Id.* 108 S.Ct. at 2569. By contrast, there had been other claims where both the governmental practice

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[7] No evidence was presented as to the number of tourists who actually viewed the Temple during those late night hours.

and the application of the practice were scrutinized for Establishment violations. *Id.*, at 2570 (noting that an otherwise valid statute authorizing grants might be challenged, as applied, on the basis of a particular grant's impermissibility).

In *Bowen* the Court found the challenged statute to be facially valid. *Id.*, at 2579. The Court then examined whether the statute was valid as applied. The Court found, however, that there was evidence about how the statute was being administered that had not been considered by the lower court. Consequently, this Court remanded the case to determine whether the statute, as applied, had the primary effect of advancing or inhibiting religion. *Id.*, at 2580-2581.

In this case, the Tenth Circuit was clearly examining facts surrounding the practice of giving away electricity to promote tourism. As such, the court was examining the practice as it was applied. The Court of Appeals also decided that the message conveyed by the logo, including a picture of the Temple, would determine whether the logo had the primary effect of advancing a religion. Petition, pp. 13a-14a. The court quoted from three versions of what message the picture of the Temple on the logo communicated – no one version was consistent with the others. *Id.* Just as this Court remanded *Bowen v. Kendrick, supra,* the Tenth Circuit remanded *Foremaster* to determine the primary effect of the logo. *Id.*, p. 14a. The remand was proper and the remand was precisely in line with precedent set by this Court.

CONCLUSION

The crucial issues raised in this matter are moot. The remaining factual issue – the primary effect of the City logo – should be resolved by the trial court before this Court grants a Writ of Certiorari.

The Tenth Circuit followed the decisions of this Court with regard to determining Foremaster had standing to challenge the electricity subsidy and to challenge the religious building being pictured on the City logo.

The Tenth Circuit correctly found that the City's gifts of electricity to a single church violated the Establishment Clause. Finally, the Tenth Circuit followed this Court's direction in remanding the issue concerning the public's perception of the City logo.

The petition of the City of St. George, Utah for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 2, 1990

No. 89-1197

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CITY OF ST. GEORGE,
Petitioner,

v.

PHILLIP L. FOREMASTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent, not surprisingly, devotes great rhetorical energy to asserting procedural or jurisprudential obstacles designed to persuade this Court to avoid the basic and fundamentally important constitutional holdings of the Tenth Circuit in this case. In the process, respondent seeks to preserve his right to collect significant attorneys fees, a result which respondent neglects to mention in his brief. Respondent's efforts ultimately should be unavailing, however, because neither the ripeness nor mootness doctrines properly should prevent a grant of certiorari.

The Tenth Circuit's first holding on the merits—that any "governmental subsidy directed at religious institutions and not required by the Free Exercise Clause conveys a message of endorsement"—will result in an enormous expansion in the amount of governmental conduct that will be invalidated under the Establishment Clause.

Respondent does not deny that. The court's other holding that the "primary effect" of governmental action is a question of fact for trial will have a similarly broad effect on Establishment Clause analysis, by leaving this sensitive constitutional question in the hands of a jury. Because the holdings of the Tenth Circuit on both these issues and on issues of standing are inconsistent with those of its sister circuits and with the prior holdings of this Court, review plainly is warranted.

1. Respondent argues that the issue of the constitutionality of the display of the St. George Temple on the City logo is moot because "the City has ceased its *pervasive display* of the City logo." Opp. 9 (emphasis added). In the next breath, respondent tells this Court that the same issue is not ripe because it has been remanded for trial under the newly articulated Tenth Circuit standard for determining the "primary effect" of the logo. Opp. 11-12. Neither of respondent's inherently contradictory arguments is correct.

First, with respect to mootness, the only change that has occurred since the respondent obtained his judgment is that the City has decreased the number of locations at which the logo is displayed—although the logo "remains" on display at various locations around City Hall. Opp. 10-11. Respondent does not explain how Article III jurisdiction or the First Amendment claim turns on the "pervasiveness" with which the City displays the logo. In fact, the *degree* to which the logo is displayed is irrelevant to respondent's claim that the *content* of the City logo is unconstitutional. The only possible issue to which this fact could be relevant is respondent's standing. But, if he is claiming that he no longer has standing on this issue, then the judgment of the district court, which so held, should be affirmed.

Second, with respect to the claim that the issue is not "ripe" until after trial is completed on remand, respondent simply is incorrect. Opp. 11-12. This Court "has

unquestioned jurisdiction" to review even interlocutory judgments of the federal courts and will do so where

> there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari . . .

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224-25 (1986). Here, the Tenth Circuit reversed the district court's entry of judgment for petitioner on the ground that the "primary effects" prong of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) requires a trial to determine "what an average observer would perceive when viewing the action of the City [in using the sketch of the temple as part of the logo]." Pet. App. 12a. Absent the Tenth Circuit reversing itself, nothing that occurs at that trial will make that legal holding more appropriate for review than it is now.

2. Respondent also argues that the issue of the electrical credit has been moot for "over three years" and therefore "does not meet Article III requirements for a live controversy." Opp. 10. This argument simply is disingenuous—the controversy is as "live" now as it was when *respondent appealed to the Tenth Circuit.* The City discontinued the "subsidy" in June 1986 after a third-party, the newly appointed President of the temple announced that he would undertake lighting the temple, regardless of any subsidy. The district court—on December 17, 1987—then denied respondent's request for attorneys fees on the ground that respondent was not a prevailing party. Pet. App. 40a.[1] Based *solely* on the denial of attorneys fees, respondent thereafter appealed to the Tenth Circuit, obtaining on August 3, 1989 the favorable rulings on

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[1] The district court held that respondent "had no standing and hence did not and could not receive relief on the merits of his claim." Pet. App. 37a. Thus, respondent was not a prevailing party and was not eligible to collect attorneys fees related to this issue. Pet. App. 35a.

standing and on the merits of the Establishment Clause claims that are raised in the petition.[2]

If the tens of thousands of dollars in attorneys fees, alone or in conjunction with the threatened recurrence of the issue (see Pet. 3, n.3), were sufficient to create a "case or controversy" in the Tenth Circuit, then the same attorneys fees are sufficient to keep this case "alive" for purposes of the City's petition. If not—if the case has been "moot" for three years as respondent suggests—then the court below was without Article III jurisdiction to enter its judgment and mandate, and this Court has an obligation under the *Munsingwear* doctrine to remand with orders to the Tenth Circuit.

> to set aside [*i.e.*, vacate] the decree below and to remand the cause with directions to dismiss.

Duke Power Co. v. *Greenwood County*, 299 U.S. 259, 267 (1936); *United States* v. *Munsingwear Inc.*, 340 U.S. 36, 39-41 (1950) (citing additional cases).[3] This practice of "vacating the judgment below is *binding on the courts of appeals as well as the Supreme Court.*" *Supreme Court Practice*, at 723 (emphasis added). By vacating the judgment below, the federal courts avoid the *res judicata* and precedential effect of a judgment "review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

In sum, respondent cannot have it both ways. Either the issue is appropriate for review by this Court or the attorneys fee award should be vacated. But, respondent

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[2] The Tenth Circuit specifically ordered that, on the electrical subsidy, the judgment of the district court was "reversed and remanded for a calculation of attorneys fees . . . ." Pet. App. 14a.

[3] See *Government of the Virgin Islands* v. *JDS Realty Corp.*, 108 S.Ct. 687 (1988) (petition granted "and the case is remanded . . . to consider the question of mootness"); *JDS Realty Corp.* v. *Government of the Virgin Islands*, 852 F.2d 66, 67 (3rd Cir. 1988) (claim on remand is "dismissed as moot" and "vacated with instructions to the district court to dismiss the action").

should not be permitted to collect a huge fee award based on a clearly incorrect legal theory and then insulate that award from review by claiming mootness.

3. With respect to respondent's standing to challenge the content of the City logo, petitioner demonstrated the conflict between the Sixth, Tenth and Eleventh Circuits—which hold that any offensive "contact" with a religious symbol provides standing to challenge the symbol—and the Seventh Circuit—which holds that "contact" alone is not enough. Pet. 11-13. Despite the fact that the court below *acknowledged* this conflict (Pet. App. 10a), respondent states that these conflicts were "harmonized" by this Court's earlier decision in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). That assertion is demonstrably false: the decisions in question, which were issued from 1983 to 1989, constitute conflicting interpretations of *Valley Forge*. See Pet. 11-14. Those conflicts cannot be deemed to have been "harmonized" by this Court's *prior* (1982) decision in *Valley Forge*.

4. Petitioner demonstrated that respondent's showing of "actual or threatened injury" sufficient to grant standing to challenge the electrical subsidy was "purely speculative" and inconsistent with this Court's holding in *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). The conflict arises from the fact that the Tenth Circuit simply *assumed* that "[h]ad the City collected the cost of free electricity provided to the temple, the revenues of the Utility would have been enhanced, eliminating the need for purchasers of electricity, including Foremaster, to pay for the amount used by the temple." Pet. App. 5a-6a. In opposition, respondent reinforces the existence of the conflict by simply *repeating*, without any supporting citation, the Tenth Circuit's erroneous factual assumption:

> Unquestionably, the years of free electricity [to light the Temple] resulted in either higher utility

> rates or higher municipal taxes . . . . Consequently, as a ratepayer or taxpayer, [respondent] suffered economic harm.

Opp. 17. The question presented arises from the fact that this "[u]nquestionabl[e]" (*id.*) assumption is in fact questionable—indeed, the assumption is incorrect.[4] By blindly accepting this assumption,[5] the Tenth Circuit's creation of "ratepayer" standing, is nothing more than "an ingenious academic exercise in the conceivable." *United States* v. *SCRAP*, 412 U.S. 669, 688-689 (1973) (requiring that allegations in support of Article III standing "must be true and capable of proof at trial").

In sum, the Tenth Circuit's adoption of a *per se* "ratepayer" standing doctrine conflicts with this Court's well-established requirements that a federal plaintiff establish by record proof that his injury "fairly can be traced to the challenged action," and is "likely to be redressed by a favorable decision" and, accordingly, the doctrine is worthy of review by this Court (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). See Pet. 14-17.

5. On the merits of the electrical subsidy, respondent refuses to defend—and in fact devotes not a single word to—the Tenth Circuit's principle holding that: "[a] gov-

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[4] Respondent's electric bill was not affected by the $180 credit on the temple's electric bill. The electricity rates of the municipal utility are established on a standard ratemaking formula: rates are set based upon the cost of producing electricity (expense) plus a required rate of return (profit). The credit is treated as a donation, which is credited to profits, not expenses. Thus, the credit *does not increase the cost of production and thereby increase the rates paid by purchasers of electricity*; instead, it reduces the return to the shareholder, the City.

[5] The Tenth Circuit asserted, without any support in the record, that "[h]ad the City collected the cost of free electricity provided to the temple, the revenues of the Utility would have been enhanced, eliminating the need for purchasers of electricity, including Foremaster, to pay for the amount used by the temple." Pet. App. 5a-6a.

ernmental subsidy . . . not required by the Free Exercise Clause conveys a message of endorsement" in violation of the Establishment Clause. Pet. App. 8a. Respondent's silence confirms that the holding below constitutes an extraordinary view of the intersection of the Religion Clauses of the First Amendment. Such a holding is inconsistent with many decisions that have upheld benefits to religious groups that were not compelled by the Free Exercise Clause. See Pet. 18. Given the historic breadth of this Tenth Circuit holding—and its widespread effect on church-state relations, the question presented clearly warrants certiorari. See Pet. 19.

6. Finally, the Tenth Circuit's holding that the "primary effects" prong of the *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), requires a trial to determine the factual question "what an average observer would perceive when viewing the action of the City [in including the sketch of the temple on its logo]" (Pet. App. 12a) is inconsistent with decisions of the Seventh, Eighth and Ninth Circuits. Respondent's opposition ignores the conflict, but those circuits squarely have held, in circumstances irreconcilable with the decision below (see Pet. 19-20) that the "primary effect" analysis is a pure question of law subject to *de novo* review on appeal. *Id.*

Respondent's argument that a particular law might be challenged on its face or "as applied" simply misses the point. Opp. 23-24. A challenge to a law "as applied" requires a factual inquiry into what action the government *actually is taking*. See *Bowen* v. *Kendrick*, 108 S.Ct. 2562, 2580 (1988); *id.* at 2582 (Kennedy, J., concurring). That question is distinct from the question for which this case was remanded—*i.e.*, to determine how the "average observer" would characterize the "primary effect" of the governmental action. See Pet. 20-21. As Justice O'Connor noted in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the primary effects inquiry is not a question of fact, which may be resolved by reference to competing surveys of community perceptions:

> whether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is . . . in large part a *legal question* to be answered on the basis of *judicial* interpretation of social facts.

465 U.S. at 693-694 (O'Connor, J., concurring) (emphasis added). Treatment of this delicate constitutional inquiry as a question of fact for the jury would, at the very least, produce inconsistent results derived from the beliefs of jurors in a particular locality or the popularity or presence of a particular religion in the community. See Pet. 22. In either case, the question presented is an important one that should be reviewed by this Court.

* * * *

The Tenth Circuit's opinion is a veritable cooks' tour of the legal issues posed by the Religion Clauses. Unfortunately, its analysis is seriously flawed in all important respects and has done striking damage to both First Amendment and Article III doctrines in this area. A small community is now facing a claim for enormous attorneys fees as a consequence of these rulings. The Court should either vacate the basis for those fees—for the reasons conceded by respondent—or grant the petition and permit the City to challenge the legal errors in the opinion below.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

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April 6, 1990

No. 89-1197

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CITY OF ST. GEORGE,
Petitioner,

v.

PHILLIP L. FOREMASTER,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

This Court's decision, on April 17, 1990, in *Employment Div., Ore. Dept. of Human Res.* v. *Smith*, No. 88-1213, has greatly increased the significance of one of the questions presented in the petition in this case. The City of St. George currently is seeking review, *inter alia*, of the Tenth Circuit's holding that a "governmental subsidy [that is] not required by the Free Exercise Clause conveys a message of endorsement" in violation of the Establishment Clause. Pet. App. 8a; see Pet. 17-19. To the extent the decision in *Smith* has restricted the range of government subsidies or accommodations that are "required by the Free Exercise Clause," see *infra* page 2, it has expanded the number of government actions that will run afoul of the Establishment Clause under the standard now applicable in the Tenth Circuit.

1. This Court's decision in *Smith* makes it clear that the class of religious conduct and belief that is entitled to constitutional protection under the Free Exercise Clause is more "narrow" than might have been assumed. See *Smith, supra*, slip op. at 5-6; O'Connor, J., concurring at 6; Blackmun, J., dissenting at 2-3. The majority in *Smith* held that a state may forbid an act that is religiously compelled so long as the governmental prohibition is "merely the incidental effect of a generally applicable and otherwise valid provision. . . ." Slip op. at 5-6. This "narrow reading" of the Free Exercise Clause and its protection (O'Connor, J., concurring at 6) thus significantly limits the government's *obligation* to support or accommodate religious conduct and belief.

By restricting the range of state actions that are permissible under the Establishment Clause to those actions that are required by the Free Exercise Clause, the Tenth Circuit's decision—when read in conjunction with *Smith* —would render unconstitutional virtually all state accommodations of or support for religion. Thus, this Court's definition of the scope of protection under the Free Exercise Clause in *Smith* further enhances the need for review at this time of the question presented by petitioner.

2. Contrary to the holding of the Tenth Circuit, this Court in *Texas Monthly, Inc.* v. *Bullock*, 109 S.Ct. 890, 901 n.8 (1989), had suggested that state activities that benefit religion need not be mandated by the Free Exercise Clause in order to avoid violating the Establishment Clause. See Pet. App. 17-18. This Court has now reinforced that view of the nexus of the religion clauses in *Smith*:

> [T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.

Slip op. at 17. However, while *Smith* more clearly defined the scope of the religious freedom mandated by the Free Exercise Clause, the government's authority to benefit or accommodate religion consistent with the Establishment Clause remains unclear. Petitioner's case presents the appropriate vehicle for determining the proper relationship between the Religion Clauses of the First Amendment.

CONCLUSION

For the foregoing reasons, and those stated in the petition and in the petitioner's reply brief, the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

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